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**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION**

In re:	Chapter 11
PHI, Inc., *et al.*,[1]	Case No. 19-30923-hdh-11
Debtors.	Jointly Administered

STATEMENT OF THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS IN OPPOSITION TO THE DEBTORS' ATTEMPTED RE-HEARING OF THE COURT'S RULING ON MOTION OF THE DEBTORS PURSUANT TO 11 U.S.C. §§ 363 AND 503 (I) AUTHORIZING THE DEBTORS TO IMPLEMENT KEY EMPLOYEE INCENTIVE PLAN AND KEY EMPLOYEE RETENTION PLAN AND (II) GRANTING RELATED RELIEF

The Official Committee of Unsecured Creditors appointed in the above-captioned cases (the "Official Committee") hereby files this its *Statement of the Official Committee of Unsecured*

[1] The Debtors in these chapter 11 cases, along with the last four digits of each Debtor's federal tax identification number, are: PHI, Inc. (5707), PHI Air Medical, LLC (4705), AM Equity Holdings, L.L.C. (0730), PHI Tech Services, Inc. (5089) and PHI Helipass, L.L.C. (4187). The corporate headquarters and the mailing address for the Debtors listed above is 2001 SE Evangeline Thruway, Lafayette, LA 70508.

Creditors in Opposition to the Debtors' Attempted Re-Hearing of the Court's Ruling on Motion of the Debtors Pursuant to 11 U.S.C. §§ 363 and 503 (I) Authorizing the Debtors to Implement Key Employee Incentive Plan and Key Employee Retention Plan and (II) Granting Related Relief (the "Statement in Opposition"). In support of the Statement in Opposition, the Official Committee respectfully states as follows:

BACKGROUND INFORMATION

1. On March 22, 2019, the Debtors filed their *Motion of the Debtors Pursuant to 11 U.S.C. §§ 363 and 503 (I) Authorizing the Debtors to Implement Key Employee Incentive Plan and Key Employee Retention Plan and (II) Granting Related Relief* [Docket No. 108] (the "Employee Incentive Motion").

2. The United States Trustee filed the *United States Trustee's Objection to Motion of the Debtors Pursuant to 11 U.S.C. § 363 and 503 (I) Authorizing the Debtors to Implement Key Employee Incentive Plan and Key Employee Retention Plan and (II) Granting Related Relief* [Docket No. 186] (the "U.S. Trustee Objection").

3. On April 12, 2019, the Debtors and the Official Committee filed the *Joint Stipulation Between Debtors and Official Committee of Unsecured Creditors Regarding Extension of Objection Deadlines for and Notice of Continuance of Hearing on Certain Matters Scheduled for Hearing on April 15, 2019* [Docket No. 236], in which the Debtors and the Committee agreed to bifurcate the hearing on the Employee Incentive Motion with respect to the Key Employee Retention Plan (the "KERP") and the Key Employee Incentive Plan (the "KEIP") and adjourn the hearing on the Employee Incentive Motion with respect to the KEIP to April 29, 2019.

4. On April 15, 2019, the Bankruptcy Court held a hearing to consider the Employee Incentive Motion with respect to the KERP only. On April 16, 2019, the Court entered its *Order*

(I) Authorizing the Debtors to Implement to Key Employee Retention Plan and (II) Granting Related Relief [Docket No. 260], which granted the Employee Incentive Motion with respect to the KERP and adjourned the hearing on the Employee Incentive Motion with respect to the KEIP to April 29, 2019 (the "KEIP Hearing").

5. The Official Committee filed its *Objection* and *Amended Objection of Official Committee of Unsecured Creditors to the Motion Pursuant to 11 U.S.C. § 363 and 503 (I) Authorizing the Debtors to Implement Key Employee Incentive Plan and Key Employee Retention Plan and (II) Granting Related Relief* [Docket Nos. 293 and 302] (the "Committee Objection") to which the Debtors filed a reply [Docket No. 344].

6. At the commencement of the KEIP Hearing, counsel for the Debtors announced to the Court that:

> [W]e have, over the course of the last 24 hours and into this hearing, worked constructively with the Committee to reach a deal. We have papered the deal. Our client has signed off, I believe, and I'll ask Creditors' Committee counsel to also confirm at the end that not only do they agree with the deal that I read into the record, but also that their Committee has approved that deal.

Hearing Transcript pp. 219-20, lns. 23-25, 1-4. Debtors' counsel then proceeded to meticulously read into the record the parties' agreement to modify certain provisions of the KEIP (the "KEIP Agreement"). *See* Hearing Transcript pp. 220-23. A copy of the April 29, 2019 Hearing Transcript is attached to this Statement in Opposition as **Exhibit A** (the "Hearing Transcript").[2] One of the key negotiated provisions of the KEIP Agreement was that "[t]he net operating cash flow metric would switch to an EBITDA metric based on the Debtors' 2019 business plan, provided that $35 million of EBITDA would be the threshold metric, and that metric would be adjusted based on the

[2] The KEIP Hearing portion of the Hearing Transcript is contained within pages 219-237 of the Hearing Transcript.

timing of the exit…and all EBITDA targets are net of all amounts payable under the KEIP plan." Hearing Transcript p. 220, lns. 11-19.

7. Debtors' counsel thereafter asked counsel to the Official Committee to confirm that the terms of the KEIP Agreement as read into the record had been agreed to by the Official Committee, and counsel to the Official Committee confirmed the Official Committee's approval of the agreement. Hearing Transcript p. 224, lns. 1-4. Contrary to the Debtors' recent assertions, the KEIP Agreement was not subject to, or conditioned on, further discussion, negotiation or approval of definitive documentation. Indeed, after reading the entire KEIP Agreement into the record, Debtors' counsel stated, "So, Your Honor, that's the record. That's the deal." Hearing Transcript p. 223, ln. 13.

8. To address the U.S. Trustee's objection to the KEIP, the Debtors then proceeded to make an evidentiary record, including the proffered testimony of the Debtors' CRO, to support the Debtors' request that the Court approve the KEIP as modified by the KEIP Agreement. Hearing Transcript pp. 224-27. Counsel for the U.S. Trustee cross-examined the Debtors' CRO, and the Court heard argument from the U.S. Trustee and counsel for the Debtors. Hearing Transcript pp. 227-36. After taking a brief recess, the Court issued and orally approved the KEIP as modified by the KEIP Agreement and requested that the Debtors' counsel prepare and circulate a form of order. Hearing Transcript p. 237, lns. 1-5.

9. The Debtors never circulated a proposed form of order to reflect the Court's oral ruling at the KEIP Hearing. In fact, soon after the KEIP Hearing, the Debtors apparently decided that the "deal" that they read into the record was not acceptable and attempted to renegotiate the express terms of the KEIP Agreement. For example, the Debtors informed the Official Committee's advisors that they could not abide by their agreement that EBITDA targets would be

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net of amounts payable under the KEIP, which was a key component of the KEIP Agreement. Subsequently, the Debtors also requested modifications to the calculation of EBITDA inconsistent with the EBITDA calculation in the Debtors' 2019 Business Plan and, ultimately, asked the Official Committee to agree to shift the methodology for calculating bonuses back to a net operating cash flow metric.

10. The Official Committee has been willing to discuss potential modifications to the KEIP Agreement and did, in fact, engage in good faith negotiations with the Debtors on these issues. Ultimately, the parties were unable to reach a compromise to modify the terms of the KEIP Agreement.

11. On May 15, 2019, the Debtors unilaterally set another hearing on the KEIP portion of their Employee Incentive Motion by filing their *Amended Notice of Hearing on Motion of the Debtors Pursuant to 11 U.S.C. § 363 and 503 (I) Authorizing the Debtors to Implement Key Employee Incentive Plan and Key Employee Retention Plan and (II) Granting Related Relief* [Docket No. 459] (the "Amended Notice"). In the Amended Notice, the Debtors stated that "[a]t the hearing on April 29, 2019, the parties announced on the record that they reached a settlement with respect to the KEIP, **subject to approval of final documentation by the parties**." Amended Notice ¶ 9 (emphasis added). The Amended Notice further stated that "the Debtors and the Committee have engaged in further discussion with respect to such documentation and consistent with the statement made on the record at the April 29, 2019 hearing. To date, the parties have been unable to reach agreement on such documentation regarding a modified KEIP." Amended Notice ¶ 10.

STATEMENT IN OPPOSITION

12. The Court has already conducted a complete evidentiary hearing on the KEIP portion of the Debtors' Employee Incentive Motion and orally approved the KEIP as modified by the KEIP Agreement. The Debtors simply have no basis to ask this Court to rehear this matter.[3]

13. The KEIP Agreement is enforceable as a matter of law under Texas Rule of Civil Procedure 11 ("Texas Rule 11"), which applies to contested matters and adversary proceedings pending in Texas bankruptcy courts. *See Houston v. Holder (In re Omni Video, Inc.)*, 60 F.3d 230, 232 (5th Cir. 1995) (noting that when "extensive federal legislation exists but fails to address the specific issue to be decided" and where "a strong federal interest is not present, the *Erie* doctrine dictates the application of state law" and concluding that Texas Rule 11 applies to a settlement announced before a bankruptcy court sitting in Texas where "the alleged agreement was negotiated and to be performed in Texas."); *In re McCarble*, No. 14-33210, 2016 Bankr. LEXIS 2822, at *6 (Bankr. S.D. Tex. Aug. 4, 2016) ("[Texas] Rule 11 applies to a settlement announced before a bankruptcy court."); *Janzen v. Classy Chassis, Inc., (In re Classy Chassis, Inc.)*, Adv. No. 01-5102, 2003 Bankr. LEXIS 1974, at *3 (Bankr. W.D. Tex. Sept. 4, 2003) ("Settlements made in a bankruptcy case are governed by state law, not federal law."); *In re Mortg. Analysis Portfolio Strategies*, 221 B.R. 386 (Bankr. W.D. Tex. 1998) (applying Texas Rule 11 to a settlement agreement entered into in connection with a contested matter).

14. Texas Rule 11 provides that:

> Unless otherwise provided in these rules, no agreement between attorneys or parties touching any suit pending will be enforced unless it be in writing, signed and filed with the papers as part of the record, or ***unless it be made in open court and entered of record***.

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[3] Because the Court has already ruled on the Employee Incentive Motion, if the Debtors disagree with the result, a more appropriate approach would likely be to file a motion to reconsider.

Texas Rule of Civil Procedure 11 (emphasis added). Here, as detailed above, the KEIP Agreement was negotiated, agreed to, and then recited in its entirety "in open court and entered into the record" by Debtors' counsel and confirmed by counsel for the Official Committee. All material terms of the KEIP Agreement were read into the record, and the KEIP Agreement was not (contrary to the Debtors' statements in the Amended Notice) "subject to approval of final documentation by the parties". Amended Notice ¶ 9. The KEIP Agreement, as approved by this Court on April 29, 2019, is plainly enforceable against the Debtors.[4]

15. This behavior is precisely the kind that Texas Rule 11 is designed to prevent. One of the overriding purposes of Texas Rule 11 is to "avoid any dispute over the terms of an 'oral settlement agreement.'" *In re Mortg. Analysis Portfolio Strategies*, 221 B.R. at 10 (finding that an oral settlement agreement that was read into the record at a deposition and then later filed with the court complied with Texas Rule 11 because "[t]his procedure clearly avoids any dispute over the terms of an 'oral settlement agreement' which the Texas Supreme Court in *Padilla* found was the purpose of the Rule. And here, there is no dispute as to what was said or agreed upon. How can there be? It was recorded when made and then filed of record."). When a court determines that a settlement agreement has been entered into in compliance with Texas Rule 11, the agreement may be "summarily enforced." *White Farm Equipment Co. v. Kupcho*, 792 F.2d 526, 530 (5th Cir.

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[4] Even if the KEIP Agreement were subject to further documentation, that would not change the nature of the agreement or its enforceability against the Debtors. *See e.g. White Farm Equip. Co. v. Kupcho*, 792 F.2d 526 (5th Cir. 1986) (finding that where all of the material terms of a settlement agreement had been agreed to and read into the record by the parties and where the court had ordered the parties to "draft documents reflecting their agreement", that the refusal by one of the parties to sign the documents ultimately prepared did not render the initial agreement unenforceable); *Gen. Metal Fabricating Crop. v. Stergiou*, 438 S.W.3d 737 (Tex. App. 2014) (holding that a settlement agreement read into the record that contemplated entry into a number of formal agreements to implement the settlement, including "a promissory note, deed of trust, security agreement, and any necessary financing statements" was a binding settlement agreement and not conditioned on final entry or agreement upon formal documentation); *Herring v. Heron Lakes Estates Owners Ass'n*, No. 14-09-00772-CV, 2011 Tex. App. LEXIS 5 (Tex. App. Jan. 4, 2011) ("Parties may enter into a binding settlement agreement even if the parties contemplate that a more formal document memorializing the agreement will be executed at a later date.")

1986) ("Federal Courts have held under a great variety of circumstances that a settlement agreement once entered into cannot be repudiated by either party and will be summarily enforced.") (quoting *Cia Anon Venezolana de Navegacion v. Harris*, 374 F.2d 33, 35 (5th Cir. 1967)).

16. In *In re Omni Video*, the Fifth Circuit emphasized that enforcing settlement agreements that comply with Texas Rule 11 supports the Fifth Circuit's "policy that valid settlement agreements should be enforced" and emphasized that "[l]itigants may not disavow compacts thus made and approved, for avoiding the bargain would undermine its contractual validity, increase litigation, and impair efficient judicial administration." 60 F.3d at 233 (quoting *White Farm Equipment Co.,* 792 F.2d at 528). In *White Farm Equipment Co.*, the Fifth Circuit further explained that:

> While suits are filed and defended so that they may be decided in accordance with law, compromise of purely private litigation is universally encouraged. When the trial date has arrived, the parties are assured of their day in court. They may then, faced with an imminent decision by a judge or jury, compose their differences. But, having decided to compromise and having obtained court approval, they may not back and fill.

792 F.2d at 530.

17. The facts here perfectly illustrate how the failure to enforce an agreement that complies with Texas Rule 11 increases litigation and impairs efficient judicial administration. For whatever reason, the Debtors have decided that they do not like the "deal" that was announced on the record and now want to disavow the KEIP Agreement. Allowing the Debtors to re-trade the KEIP Agreement would not only be contrary to controlling Fifth Circuit precedent, but it would also reward the kind of improper behavior that Texas Rule 11 was designed to prevent.

REQUEST FOR ENTRY OF PROPOSED ORDER
CONSISTENT WITH THE COURT'S PRIOR RULING

18. Attached hereto as Exhibit B is a proposed *Order (I) Authorizing the Debtors to Implement Key Employee Incentive Plan and (II) Granting Related Relief* (the "Proposed Order"), which memorializes and incorporates the Court's ruling approving the KEIP as modified by the KEIP Agreement. The Official Committee respectfully requests that the Court enter the Proposed Order.

NOTICE

19. Notice of this Statement in Opposition shall be provided to all parties on the Debtors' Limited Service List. The Official Committee respectfully submits that such notice is sufficient under the circumstances and that no further notice is required.

WHEREFORE, for the reasons set forth herein, the Official Committee respectfully requests (i) entry of the Revised Proposed Order and (ii) such other relief as is just and proper.

Dated: May 28, 2019

Respectfully Submitted,

By: */s/ Ian T. Peck*

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on May 28, 2019, true and correct copies of the foregoing were served (i) via e-mail (where available) or via United States first class mail, postage prepaid on the parties on the attached Service List; and (ii) via e-mail on the parties who receive electronic notice in this case pursuant to the Court's ECF filing system.

/s/ Ian T. Peck
Ian T. Peck

PHI, Inc., ***et al.***
Core/2002 Service List
Case No. 19-30923-SJG

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PHI, Inc., ***et al.***
Core/2002 Service List
Case No. 19-30923-SJG

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Local Counsel for Secured Creditor Thirty Two, LLC	Rochelle McCullough, LLP	Attn: Michael R. Rochelle, Kevin D. McCullough, Shannon S. Thomas	325 N. St. Paul Street	Suite 4500	Dallas	TX	75201		214-953-0182	214-953-0185	buzz.rochelle@romclaw.com kdm@romclaw.com kdm@romclaw.com
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Securities and Exchange Commission - Regional Office	Securities & Exchange Commission - Fort Worth Office	Attn: Bankruptcy Department	Burnett Plaza	801 Cherry St. Ste. 1900 Unit 18	Fort Worth	TX	76102		817-978-3821		dfw@sec.gov
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Counsel to Christina C. Wray, on Behalf of Herself and All Other Similarly Situated Persons	Singer & Levick, P.C.	Attn: Larry A. Levick, Esq.	16200 Addison Road, Suite 140		Addison	TX	75001		972-380-5533	972-380-5748	levick@singerlevick.com
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PHI, Inc., *et al.*
Core/2002 Service List
Case No. 19-30923-SJG

DESCRIPTION	NAME	NOTICE NAME	ADDRESS 1	ADDRESS 2	CITY	STATE	ZIP	COUNTRY	PHONE	FAX	EMAIL
Counsel to Texas Department of Insurance, Division of Workers' Compensation	Texas Attorney General's Office	Attn: Todd B. Headden, Assistant Attorney General	Bankruptcy & Collections Division	P. O. Box 12548- MC 008	Austin	TX	78711-2548		512-463-2173	512-936-1409	Todd.Headden@oag.texas.gov
Counsel for the Texas Comptroller of Public Accounts	Texas Comptroller of Public Accounts	Attn: Courtney J. Hull, Assistant Attorney General & Sherri K. Simpson, Paralegal	Attorney General's Office, Attorney General's Office	P.O. Box 12548	Austin	TX	78711-2548		512-475-4562	512-936-1409	courtney.hull@oag.texas.gov sherri.simpson@oag.texas.gov
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Exhibit "A"

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

In Re:	)	**Case No. 19-30923-hdh-11**
	)	
PHI, INC., et al.,	)	Dallas, Texas
	)	April 29, 2019
Debtors.	)	9:00 a.m.
	)	
	)	MOTIONS
	)	

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE HARLIN DEWAYNE HALE,
UNITED STATES BANKRUPTCY JUDGE.

APPEARANCES:

For the Debtors:	Daniel M. Simon DLA PIPER LLP (US) One Atlantic Center 1201 West Peachtree Street, Suite 2800 Atlanta, GA 30309 (404) 736-7800
For the Debtors:	Thomas R. Califano Michael D. Hynes DLA PIPER LLP (US) 1251 Avenue of the Americas New York, NY 10020-1104 (212) 335-4500
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Proposed Counsel, Official Committee of Unsecured Creditors:	Dennis F. Dunne Alan J. Stone MILBANK, LLP 55 Hudson Yards New York, NY 10001-2163 (212) 530-5770

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For Official Committee of Equity Security Holders:	Jason S. Brookner GRAY REED & MCGRAW, LLP 1601 Main Street, Suite 4600 Dallas, TX 75201 (469) 320-6132
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Proceedings recorded by digital sound recording; transcript produced by transcription service.

DALLAS, TEXAS - APRIL 29, 2019 - 9:00 A.M.

THE COURT: I'll take appearances in the courtroom in PHI, Inc.

MR. CALIFANO: Good morning, Your Honor. Tom Califano with DLA Piper on behalf of the Debtors. With me at counsel table are my partners Dan Simon and Michael Hynes.

THE COURT: Welcome.

MR. DUNNE: Good morning, Your Honor. Dennis Dunne from Milbank, LLP, proposed counsel for the Official Committee of Unsecured Creditors. I am joined in the courtroom by my partners Andrew Leblanc and Alan Stone. Thank you.

THE COURT: Welcome to our Court.

MR. STONE: Good morning, Your Honor.

THE COURT: Good morning.

MR. PECK: Good morning, Your Honor. Ian Peck with Haynes and Boone, proposed co-counsel to the Committee. I think Mr. Staab is going to join me a little later.

THE COURT: Welcome.

MR. CLEMENT: Good morning, Your Honor. Zack Clement and Kevin McCullough on behalf of Thirty Two, LLC, secured creditor.

THE COURT: Welcome to you.

MR. LEVICK: Good morning, Your Honor. Larry Levick on behalf of putative class action plaintiff Christina Wray.

THE COURT: Welcome.

MR. STRUBECK: Good morning, Your Honor. Louis Strubeck of Norton Rose Fulbright. I'm here with Greg Wilkes, and we represent Wilmington Trust Company, Indenture Trustee for the senior notes, the $500 million senior notes. I believe that Mr. Somerstein is on the phone as well, so he'll make an announcement in just a second. Thank you.

THE COURT: Okay. We'll take appearances by CourtCall in a minute.

MS. CHIARELLO: Good morning, Your Honor. Annmarie Chiarello of Winstead, P.C. here on behalf of Wells Fargo Equipment Financing.

THE COURT: Welcome to you.

MR. MOORE: Good morning, Your Honor. Will Moore from Katten Muchin Rosenman representing Banc of America Leasing & Capital.

THE COURT: Welcome.

MR. BROOKNER: Good morning, Your Honor. Jason Brookner; Gray, Reed & McGraw; for the Equity Committee, along with David Golubchik, who's over here, from Levene, Neale, Bender, Yoo & Brill in California.

THE COURT: Welcome to our court, sir.

MR. GOLUBCHIK: Good morning, Your Honor. I didn't know if I needed to show up. I mean, over here.

THE COURT: Glad to have you.

MR. GOLUBCHIK: Thank you.

THE COURT: Showing up is always a good idea.

MS. KIPPES: So here I am. Good morning, Your Honor. Meredyth Kippes on behalf of the United States Trustee.

THE COURT: Good morning to you. I'll take appearances by CourtCall.

MR. DAVIS: Good morning, Your Honor. Matthew Davis on behalf of Airbus Helicopters.

THE COURT: Welcome.

MS. GREWAL: Good morning, Your Honor. Angela Grewal on behalf of Regions Equipment Finance Corporation.

THE COURT: Welcome to you.

MR. LIM: Good morning, Your Honor. Lloyd Lim on behalf of Fifth Third Equipment Finance.

THE COURT: Good morning. Anyone else wish to make an appearance by CourtCall?

For your benefit, we have several representatives of the press listening in.

MR. CALIFANO: Well, I'll try and behave myself, then, Judge.

Your Honor, a few things to just inform the Court about, and then I think I have some, hopefully, good news. And then we can talk about the suggested way of going forward.

Your Honor, as you may be aware, on Thursday the Equity Committee was formed. Okay. Also on Thursday, the Debtors' management did a presentation of the business plan to the

Committee members. On Friday, we had a call with the Equity Committee lawyers. And rather than -- you know, I had originally said we were going to bring a motion to disband the Equity Committee. On second thought, we thought we'd talk to them, see if we could talk -- find a limited scope and duration, and maybe a motion may not be necessary. So we're trying to see if we can work that out. So we had a call with their lawyers on Friday.

Also on Friday, the Debtors filed the valuation by Houlihan, which is a supplement to the disclosure statement, and the liquidation analysis.

On Sunday, Houlihan did a presentation of their valuation to the actual members of the Equity Committee.

And then, Your Honor, since that time, the company was able to have Houlihan agree to voluntarily reduce their fees by providing a 30 percent discount for any financing transaction fees. That happened late in the day yesterday. We didn't get a chance to let everyone know. It's -- but, basically, the secured financing portion goes from a two percent fee to a 1.4 percent fee. The unsecured portion, three percent to 2.1 percent. And for any equity raise, six percent to 4.2 percent. And that impacts the Houlihan fee.

Another thing that impacts the Houlihan fee, Your Honor -- and listen, there's a lot of he said/she said going on here, but we try to engage. We've tried to engage with the

Committee to see what their major issues were, and we were unable to do so. Whether it's our fault or their fault doesn't matter.

But in reading their pleadings, it seemed like the two issues that they have with our plan are the rights offering provision and the discounted buyout. And it seems like they were interpreting that as some way for the existing equity to come back and get a bigger slice of the pie. And as I informed Mr. Dunne shortly before the hearing, the Debtors have agreed to remove both the rights offering and the discounted buyout provision from the plan.

So it simplifies the plan. You know, we didn't think it was problematic. We thought it was an investment opportunity offered to the unsecureds. But instead it's coming out, Your Honor, completely. And it's going to be a simple equitization under the plan.

Now, to get the hopefully good news. There was a conversation between the financial advisors for the Committee, one of the committee members, Mr. Del Genio, Alan Brass, who is an independent director, chair of the restructuring committee and also on the comp committee, and Mr. Lance Bospflug. And I believe that a deal on the KEIP, a deal in principle, was worked out on the KEIP. And right now, Mr. Del Genio and Mr. Zellin are trying to write it up so that we have something we can announce.

So that, that is a positive development. And maybe they were able to make a deal because the lawyers weren't on the phone. I don't know.

But, so we have a number of matters on today, Your Honor. The Debtor has on the ordinary course professionals motion. We've received no objection to that. We also have the continued hearing on the utilities motion. We've received no objection to that. We also have the key employee incentive program motion, which I just mentioned, and hopefully that is resolved. We have the Houlihan retention application, which has been adjourned from April 15th by agreement of the parties. And then, finally, Your Honor, we have a mediation motion. Okay?

And then the UCC has filed a motion in limine, and what they call an 1103 motion to put things off. So my recommendation, and this is what I ran by Mr. Dunne -- and if I've gotten any of it wrong, Dennis, just please let me know -- that, because of the time constraints we have today, I would recommend we put -- with Your Honor's approval, we put on the ordinary course and utilities motions. There's no objection. They should go smoothly. Then we move right into the Houlihan retention so we can get that done.

Hopefully during that time, Mr. Del Genio will run into court with a piece of paper saying we have a deal and that we will not need to go into the KEIP. If we do need to go into

the KEIP, we're prepared to go forward on that.

And then with respect to the mediation motion, Mr. Dunne and I agreed to just take a break between the hearings, and it might be coincidentally at lunchtime, and we've been talking about a mediation process. I need to confer with my side, he needs to confer with his side, but we would just ask -- and then after that we, you know, we can have the -- if we need to address, we can address the Committee's 1103 motion.

But that would be my recommendation, Your Honor, for how we would proceed today.

THE COURT: All right. Mr. Dunne?

MR. DUNNE: Good morning, Your Honor. For the record, Dennis Dunne from Milbank on behalf of the Official Creditors' Committee.

And Mr. Califano is correct. We had a sidebar before the hearing commenced and he informed me of some of the -- of the scheduling issues here. And I'm generally okay with what Mr. Califano proposed, and he's right that either we're on the cusp of getting to a deal on the KEIP and the KERP, so hopefully with a, you know, a few extra minutes, we can kind of wrap that up and save everybody some time on that.

And then we're happy to talk about mediation. You know, we support mediation as well, and were going to suggest it to Your Honor if the Debtors had not. So I think having a further discussion about what that -- what the terms and scope

of mediation and the duration of mediation looks like would be helpful.

That being said, I would like an opportunity at some point today to advise the Court of what we've been doing as the Official Committee as my first appearance in the courtroom before Your Honor, as well as some of the context for what's going on, recognizing -- and I agree with what Mr. Califano said at the outset -- without, hopefully, inciting any kind of incendiary language, you know, going back and forth. But I would like to do that just kind of matter-of-factly and give some context. I can do that at any point in the day. You know, we could do it -- I could do it now in connection with the KEIP, in connection with the 1103 motion or mediation, but just wanted to make the Court aware of that. That's my only addition.

THE COURT: It might make sense to do it before we start the mediation motion.

It also seems to me that putting your adjournment motion after you all talk about the mediation, because I think those kind of dovetail with each other, so --

MR. DUNNE: I agree. Thank you.

THE COURT: Thank you. Okay.

MR. CALIFANO: Your Honor, with that, Mr. Simon will address -- oh, I'm sorry.

THE COURT: Don't cut off the U.S. Trustee, Mr.

Califano.

MR. CALIFANO: I'm sorry, Your Honor.

MS. KIPPES: That's okay. Your Honor, just one note with regard to the KEIP. I have been -- the proposed resolution has been described to me generally, but I haven't seen it. I'd like to see it, since we've objected, too. So these guys may have a deal. I don't know if we have a deal or not yet.

THE COURT: All right.

MS. KIPPES: Thanks.

THE COURT: Mr. Simon?

MR. SIMON: Good morning, Your Honor. Again, Dan Simon, DLA Piper, on behalf of the Debtors. I will be very brief.

THE COURT: Okay.

MR. SIMON: Obviously, we have much to get through.

THE COURT: All right.

MR. SIMON: The first matter on the agenda is the final utilities matter. Your Honor heard this shortly after the first-day hearing. We did not receive any formal or informal objections. We have received a handful of additional adequate assurance letters from utilities. We continue to process them per the procedures laid out in the motion. We have not received any comments to the order. We have uploaded a form of order, the only changes of which are simply to

update the contact list and the notice parties since we filed it on the first day.

THE COURT: All right. Just let me ask for the record: Does anyone wish to be heard on the entry of a final order on utilities?

If you would upload that order, I'll sign it upon -- well, I guess we already have it now, so I could -- I may even be able to sign it today.

MR. SIMON: Thank you, Your Honor.

The next item on the agenda is the motion to employ and retain professionals in the ordinary course. We filed this motion, and the procedures split the -- split the professionals into two tiers, Tier 1 and Tier 2, depending on how much we expected them to bill during the case.

We have had -- I've had a number of discussions with Ms. Kippes from the U.S. Trustee's Office on this motion. We've made some changes. We have reduced the Tier 2 amount from $75,000 per month to $60,000 per month. We've also provided an aggregate cap of $250,000. If a professional exceeds that cap, they simply need to file a notice of excess fees.

And lastly, what we've done is we've gone through -- we tried to be overinclusive in our exhibit, listing out the professionals, recognizing that, at least in this district, there's not perfectly clear guidelines on who falls under the professionals and who doesn't. So we have worked with the

U.S. Trustee and actually removed some of the professionals as they were probably borderline in the first place, and she wanted some clarification that they didn't fall within the ambit of the professionals.

And so we have uploaded that order, and I'll ask Ms. Kippes to confirm that agreement, that it resolves her objection.

MS. KIPPES: Confirmed, Your Honor.

THE COURT: Thank you.

For the record, does anyone else wish to be heard on the ordinary course professionals motion?

I'll also sign that.

MR. SIMON: Thank you, Your Honor. Now we can get back to bigger and better things. Thank you.

THE COURT: All right. Let me ask, there is a motion in limine that may affect the Houlihan hearing. Do we need to address that first?

MR. CALIFANO: Well, it's not our motion, so --

THE COURT: I understand, but --

MR. LEBLANC: Your Honor, Andrew Leblanc with Milbank.

It is our motion. I don't know, frankly -- the witnesses that it was directed at, I don't know if they're intended to be witnesses for the Houlihan motion or not.

THE COURT: And that's why I asking Mr. Califano.

MR. LEBLANC: I thought that made sense.

THE COURT: Yeah.

MR. CALIFANO: Your Honor, Mr. Bospflug will testify in support of the Houlihan retention.

THE COURT: All right. Let's hear the motion in limine first, then, and I'll give you a ruling on that, and then we'll move into Houlihan.

And I've had a chance to read it, but I will say that I didn't read it at 3:55 when I think it was filed this morning.

MR. STONE: Yes.

THE COURT: Or at least when it was emailed over here.

MR. STONE: Yes. Your Honor, it's pretty straightforward. We asked last week on Thursday the Debtors to tell us if they were going to call any witnesses other than those who had been identified at the hearing today on any topic. They refused to tell us that. They said they would answer us in due course.

Among other things, they cited a stipulation that we had signed which said that, absent changes in the factual record, we agreed we wouldn't take any more depositions on the Houlihan and KEIP motions. In fact, after we signed that stipulation, the factual record changed significantly.

First of all, when we signed that stipulation, they had produced zero documents to us. We still only have about 400

documents, but, nonetheless, we didn't have any documents at the time we filed the stipulation.

In addition, the mere act of putting on additional witnesses changes the factual record, in our view. And as a result, we don't think that that stipulation that we signed in any way waives our ability to take the depositions of any other witnesses that they would put on in connection with the Houlihan Lokey application or the KEIP.

In addition, with respect to the 1103 motion, there was no such prohibition.

So, these two new witnesses that they put on, Mr. Bospflug and Mr. Brass, were not identified until Friday. We promptly asked for their depositions. That request was turned down. We then issued notices of deposition, which, as Your Honor is aware, when they are directed to a party, they're the same as a subpoena. So we conducted the depositions yesterday. We've attached the transcripts of those depositions to the motion. The witnesses did not show up, so there's a certification of nonappearance from the court reporter for each of those depositions. And as a result, we believe that the witnesses should be precluded from testifying today on any topic.

THE COURT: Thank you, Mr. Stone. It's nice to have you back in our Court.

MR. STONE: Thank you, Your Honor. Nice to see you again.

MR. CALIFANO: Your Honor, I think I need to go a little bit into the background of the stipulation. And you know, frankly, I'm a little embarrassed here, because we entered into this stipulation in good faith because Mr. Genereux, who you may recall who testified at the first-day hearing, was no longer at PJT. And we were told we need to get a new expert. So we said, okay, we'll move it -- we'll move it from 4/15 to 4/29, which is when we had time in front of Your Honor.

We said, let's see your objection, but you can amend it after you designate your witness. And they did. And they did as we agreed. There's a bunch of other things in here that's unusual. One thing is they were so afraid of what we might say on April 15th, at the April 15th hearing, that we agreed to limit what we would say and not say anything negative about the Indenture Trustee or about the Committee. And we didn't. But it was important to us, Your Honor, that we not get hit with depositions, okay? What I should have anticipated was they were going to use that two weeks to file this so-called 1103 motion and then a motion for standing. And I guess they thought there was some litigation tactic to have those on before we got here today.

So that's what I'm embarrassed about. I should have anticipated that and I should have anticipated that the real reason behind the adjournment was so that they could throw

some more paper at us.

The factual record has not changed, okay? And the factual -- they say that the discovery was -- the document discovery had not been produced. Well, it wasn't due then. We complied. They served us with discovery requiring an expedited two-week return. So we started production, okay? We didn't come back here and say, well, the Local Rules -- the Federal Rules give us 30 days, you've got to get a motion on to shorten time. We didn't do that. We voluntarily complied. And we're continuing to comply. But if they didn't have the discovery, that's their fault, because they set the time frame on it, okay?

Additional witnesses: We didn't -- we didn't designate additional witnesses. We complied with the Local Rule. And they probably should have looked at the Local Rule. The Local Rule requires that you file your witness list three days before the hearing. We did that, Your Honor. It also says -- 9014(1)(c)(2) says it assumes that the Debtors will testify at the hearing.

The two witnesses we have are witnesses of the Debtor. One is a, as I said, the head of the special restructuring committee and compensation Committee. One is Mr. Bospflug. Okay? Just because we designated witnesses within the Rule doesn't mean that's an additional witness.

They didn't serve a 30(b)(6) at any time. They never

said, and it doesn't say in the stipulation, that they'll get depositions.

The reason why we entered into the stipulation, part of the underlying consideration was that the discovery would stop. We expressly said, we don't want depositions during this two-week period. But unfortunately, it is.

Now, the Local Rule doesn't say that once you file your witness list you have to make the witnesses available for deposition, because then every time we have a Monday hearing I'd have to have all my witnesses here on Saturday or Sunday, ready to be deposed. That's not what the Local Rules hold.

So then what happens, where do you go next? To the Federal Rules? The Federal Rules don't require that any witness on a motion be available for a deposition, nor does it permit someone to send a notice on a Friday afternoon demanding a deposition on a Sunday.

So we didn't comply, Your Honor. And we told them we weren't going to comply, okay? It -- we weren't going to change people's travel schedule when they were doing something which was directly contrary to what we had thought about in the stipulation.

So they hire -- what did they do? They bring a court reporter in -- obviously, they don't care about the costs of this case, they don't care about the court reporter's Sunday -- when they knew there wasn't going to be a witness.

The two witnesses, they know who they are, Your Honor. They could have had -- they could have served notices at any time.

And the other thing about the factual record that's disingenuous, we have witnesses who are going to testify to the facts that are in our motions, okay? So if the KEIP is not settled, then Mr. Brass will come up and testify to the assertions that are made in our motion about how the comp committee operated and approved these bonuses, okay?

Mr. Bospflug, in the Houlihan retention, is going to testify to those facts related to the Houlihan retention in our motion, Your Honor. Because, you know, we like to have a witness when we try and -- when we put facts forward in a motion.

This is a bad faith motion. This is a motion, another attempt to try and derail this case. And for them to come in here not having done what they should have done, okay -- I mean, if they were really acting in good faith, this stipulation would have provided for depositions, okay? It doesn't. It expressly deals with it.

Now, additional facts in the record would be if we filed a supplemental motion, Your Honor, or if we put in a new declaration. These aren't new facts. We're not coming in with new facts. And the fact that a witness is designated for facts we allege, that's just what you're supposed to do. When

you come in here and make statements of fact, you should have a witness.

This shouldn't be delayed again, Your Honor. It was delayed at their request, and it should not be delayed any further.

But if Your Honor is willing to entertain this motion at all and if Your Honor disagrees with me that this is just a bad faith attempt to derail us one more time, I would ask Your Honor to allow the witnesses to testify. And then if there is an additional -- an additional fact, or if any of these witnesses come in with a fact that's not in our motion, then we can deal with it, Your Honor. But this -- there's no -- there is no basis. First of all, they agreed not to do it. This nonsense about additional facts in the record is just that. And they had the opportunity if they were sincere. They're not, so they waited until Friday, asked me for a deposition notice. We complied with the Local Rules, Your Honor. There's nothing in the Local Rules that allow them to do that. There's nothing in the Local Rule that says we can't introduce a witness who we haven't made available for deposition.

We complied with the Rules. We complied with our stipulation, Your Honor. I don't know what the stipulation means if they can just say, well, you put out a witness list. We didn't anti... they had -- these aren't additional

witnesses, by the way. They -- we had never told them who our witnesses were prior, okay?

They wanted to depose Mr. Del Genio. We made him available. They wanted to depose Mr. Niemann. We made him available. So this motion, Your Honor, smacks of bad faith and is just another attempt to get in the way of a debtor who is trying to do what is completely appropriate under the circumstances. Thank you, Your Honor.

THE COURT: Thank you. Mr. Stone, you get to go last.

MR. STONE: Your Honor, my first hearing on this case, and I already get accused of bad faith. It's pretty amazing.

THE COURT: I just -- well, let me just say I have a high degree of respect for you, Mr. Stone. So, --

MR. STONE: I appreciate that, Your Honor.

Your Honor, exactly the problem. They never told us. We asked them who their witnesses would be and they didn't tell us.

It really -- you know, I haven't practiced before Your Honor in a while, but my recollection is that Your Honor is not in favor of trial by ambush. And perfectly reasonable if they want to wait until the deadline for disclosing their witnesses to us, but then it's perfectly reasonable for us to get a deposition over the weekend as well before the hearing,

so we know what those witnesses are going to say.

That's exactly the problem. They never told us who their witnesses were going to be or what topics they were going to testify. And we did ask.

And I'm not going to get into the back-and-forth on the stipulation. Suffice it to say that we think that the texture of this case and the factual record changed tremendously because we didn't have document one when we signed that stipulation. And in terms of what we knew -- what they knew at that time, I'm not going to get into the back-and-forth, but they were certainly aware that we were going to file an 1103 motion and that we were contemplating a standing motion as well.

So, Your Honor, for all the reasons that we state in our papers, we think this is sort of trial by ambush, and Your Honor shouldn't tolerate it, and these witnesses should be precluded from testifying.

THE COURT: Thank you.

MR. STONE: Thank you, Your Honor.

THE COURT: I'll take a short recess for me to visit with my law clerks and I'll give you a ruling on this.

I guess let me say this before we start. Mr. Dunne sort of touched on it. We probably need to just stick with the matters that are at hand and avoid the back-and-forth between the lawyers. I think -- at least everybody that's been

practicing in front of me, even you out-of-towners know that I really do not like that, and the locals certainly know that. So, from this point on, I expect a different tone.

We'll be in recess.

THE CLERK: All rise.

(A recess ensued from 9:29 a.m. to 9:47 a.m.)

THE CLERK: All rise.

THE COURT: Good morning again. Please be seated. Thank you very much. Please be seated. Thank you.

On the motion in limine, I'm going to allow the two witnesses to testify in support of the facts in the two motions. If the testimony deviates from the facts in the two motions, I'll allow the Committee to re-urge its motion in limine at the end.

Just a couple thoughts. I don't really consider this an ambush, as I would have anticipated the Debtor would put on Debtor representatives to testify about the KEIP and Houlihan motions.

On the other hand, for lawyers of your caliber, if asked prior to formal designation of witnesses per the Local Rules, if you were asked who you intended to call, I would think that you would provide those names prior to filing a witness list.

There is an allegation in Footnote 8 of the motion that documents were late in getting over to the Committee. I'll reserve that to the time that they're offered.

You may call your first witness.

MR. CALIFANO: Yes, thank you. Your Honor, Mr. Hynes will handled the witness.

MR. HYNES: Your Honor, the Debtor calls Matt Niemann.

THE COURT: Mr. Niemann. Good morning. Would you raise your right hand?

MR. NIEMANN: Good morning, Your Honor.

MATTHEW NIEMANN, DEBTORS' WITNESS, SWORN

THE COURT: You may be seated.

THE WITNESS: Thank you.

MR. HYNES: Good morning, Your Honor.

DIRECT EXAMINATION

BY MR. HYNES:

Q Mr. Niemann, do you see that you have some binders there behind you?

A Oh, I do, yes.

Q Yeah. Can you put them in front of you, and specifically have Exhibits 29 and 30 as we begin?

A I'm sorry, did you say look at 29 and 30?

Q Yes, sir. In particular, it would probably speed things along --

A I'm there.

Q -- if you could get to Exhibit 30. And if you look at the top, there's some typewritten language on the top. If you

turn to 28 of 40, behind Exhibit 30, I think you'll see your name there.
A I'm sorry, 28?
Q Yeah, Page 28 of 30 at the very top.
A I am there.
Q Okay. Do you see your name there?
A Yes, I do.
Q Okay. So could you state your name for the record?
A Matthew Richard Niemann.
Q And can you remind the Court where you're currently employed?
A I am a managing director with Houlihan Lokey, Inc. I'm also employed as a board member with William Lyon, Inc., a public company.
Q Can you share with the Court a brief description of your education?
A Yes. I spent three years at Loyola New Orleans. I'm going back to college days, no further. And then graduated from St. Louis University in St. Louis, my hometown. Went straight to law school, St. Louis University School of Law. I also have some advanced education-type stuff, but those are my two primary. So, I have a BS/BA in finance from St. Louis University and a JD from St. Louis University as well.
Q And can you briefly describe your professional experience?
A Yes. I started at Bryan Cave as a summer associate,

actually, and then went straight into full-time associate. Was there for seven years, left. Was briefly at KPMG, then Pricewaterhouse, which then became PricewaterhouseCoopers, for a period of just shy of four years. Then I joined Houlihan Lokey 19-plus years ago. I left Houlihan Lokey for three years, give or take, returning September 15, '08. Just happens to be the day Lehman Brothers filed.

When I left Houlihan, I went to Service Capital, started their Chicago operations, and then went into GMAC Res Cap for Service Capital while I was there. It was a portfolio company of theirs. And as I said, returned to Houlihan in -- on September 15, 2008, so that's now 11 years ago; is that right? Where are we? '19? Yes.

Q So is it fair to say 17 of the last 30 years you've spent with Houlihan?

A Yes, sir.

Q Okay. Can you go over briefly your titles and responsibilities at Houlihan only?

A I'm a managing director. We have a -- you know, we're the older guys, if you will, the elders. There's five of us that are the seniormost MDs in the group, I am one of them, more by age than anything else, in the financial restructuring group. I also co-head what we call our heli, helicopter, investment banking practice. I've had several other titles and responsibilities over the years. I am resident in our

headquarters in Los Angeles, and really split my time Los Angeles, New York, and, these days, Texas.

Q Can you go over some of your responsibilities that you've had at Houlihan?

A Yeah. First and foremost is provision of professional services ensuring, I guess, best practices, for lack of a better description. You know, we're all about reputation and our brand is our reputation. So my job is to make sure we do the best job possible for our clients. My job is also to identify and source, if you will, opportunities. My job is to mentor and shape sort of our future generation of professionals. It's a very mentored-based practice. And my job is to get things done for my clients, and, consequently, for the firm, because we are paid when things get done.

Q And you mentioned that you're also currently employed by William Lyon Homes; is that right?

A Yes. I think it will be for about another month. I've had a seven-year position there as a board member. I'm the comp committee chair, have been for seven years. And I come off at the annual meeting, which I believe is this coming month, May. And also was co-chair of the IPO committee when we went public six years ago now, and on the audit and governance committees as well.

Q Are you a member of any other boards or other organizations of note?

A I enjoyed five years of what I call guest-lecturing or adjunct at Northwestern University with Professor Shine, Jim Shine, a case study that I would do each year. That was also a follow-up of the ABI. It was the MBA competition that we founded. I want to say it was, gosh, it's probably 15 years ago now. We, Houlihan, and I particularly, did the first case study, and then taught that for years at Northwestern's Kellogg School of Management. I also have been on the -- what was called disquisition committee. It's actually to review dissertation candidates for Webster University in St. Louis. I've also been on the board of my parish, Our Holy Redeemer Parish, parish counsel, as treasurer, as well as a school board, as treasurer. And the Ronald McDonald Houses. It's technically the St. Louis Oncology Association. It's the Ronald McDonald Houses of Greater St. Louis there. I was also on the executive committee and treasurer.
Q And is that an accurate summary of your biography there behind Exhibit 30 at Page 28 of 40?
A Yes, it is.
Q Okay. Have you -- how many times have you been certified as an expert in restructuring matters?
A I mean, it's -- it's in excess of 23, because literally within months of leaving Bryan Cave I was certified by Judge Barta as an expert, under *voir dire*, in fact. Never been *voir dire'd* since. And so at least 23 times, and I'd say it's

probably more like 50-plus, because at least a couple of times a year.

Q And have you ever -- has a court ever refused to certify you as a proffered expert?

A Not yet.

Q Have you ever testified on behalf of a fee application?

A I've testified on behalf of my own fee applications, Houlihan's. I have never testified against any others, other than perhaps to opine or support -- like in this case, PJT, for instance, has represented the Committee, so I'm asked my opinion by the board, and at some point I'll probably be asked my opinion in this court. And so in that respect, but never as an adverse witness, if you will, or a competing expert to challenge another professional's fees. I just never have been asked to do that.

Q Can you briefly describe for the Court Houlihan's role with PHI?

A It's evolved. It started in -- as M&A advisor with my partner, Rick Lacher, who was co-leading the engagement with me back in -- really kind of started in August; I think our engagement letter is dated September -- to explore M&A alternatives. And then it shifted, as we were approaching maturity, into restructuring, and I started taking more point from Mr. Lacher. Mr. Lacher heads up our public M&A practice. He also co-chairs our fairness committee.

So, more recently, if you will, and this, I would say, is after the first of the year, as we were approaching the March maturities, it shifted into restructuring, of doing what we could to engage with the creditors. And by that, I mean the noteholders as well as lessors. There's 130 or so of lessor obligations out there that need to be dealt with across 15 different lessors. That's just the ones that are filed. There's a couple of lessors, HN Zed, which we kept out of chapter. And then, really, to -- how should I say it? And it's part stylistic. I view my job as the chief agent for the transaction, whatever is to happen here. And so it's really to drive a transaction for the benefit of the company and its constituents, and my team is my support for that effort.

We've also, as you know, explored and procured financing. We are exploring additional financing to properly capitalize the company on its way out. Within all of that is the due diligence and the rolling up of the sleeves that's necessary, working with Mr. Del Genio and his team at FTI, working with your firm, working with Jones Walker, working with management, and, ideally, working with Milbank, PJT, and the advisors for the noteholders.

Q Generally speaking, do you play a role in negotiating engagement letters with Houlihan clients?

A Yeah, I probably play a more active role than a lot of my partners. There are several of us that are former lawyers, if

you will, so I directly negotiate and directly document my own engagement letters. It's a very important part of what we do as a firm, and it goes to risk management and making sure that we, you know, get what we negotiated for, no different than I do on behalf of a client.

Q And was your role any different in negotiating the engagement letters with PHI?

A The only difference was that I don't negotiate a whole bunch of public M&A engagement letters, but I was front on that as well, of course, with Mr. Lacher, my partner. But otherwise, it was pretty much as usual. It might have been a little more heavily-negotiated than some, but, you know, they all get negotiated.

Q And who participated in those negotiations?

A From Houlihan?

Q Yes.

A Myself. To a lesser degree, Mr. Lacher.

Q What about from PHI?

A Primarily, Mr. Bospflug -- you swallow the G, I'm told. The -- and then Mr. Gonsoulin and Ms. McConnaughhay. I'll get to the spelling on that one. It's Trudy McConnaughhay. She is the CFO and treasurer. The bulk of it was Mr. Bospflug and Ms. McConnaughhay.

Q And was PHI represented by counsel?

A Yes, they were. Jones Walker on the M&A engagement letter

in September, and then Jones Walker and Mr. Califano's firm in January when we amended and restated our engagement letter to address the restructuring mandate.

Q In connection with that negotiation of the engagement letters, did you provide any information to the company?

A Yes, we did.

Q Okay. Would you please look behind Tab 35 of the binder?

A Yes, sir.

MR. HYNES: Has the Court -- has the Court had the opportunity to get there?

THE COURT: I have it.

MR. HYNES: Thank you, Your Honor.

BY MR. HYNES:

Q Mr. Niemann, do you recognize this document?

A Yes, I do.

Q What is it?

A It's a document that I prepared, with the help of my team, but I physically -- it annoys my team sometimes, but I physically get into the Excel and prepare this specifically based on the information. It's a two-page document. Page 3 is really comparing the PJT fee as proposed, I believe this was in February, against other debtor advisors to help the board and management understand whether or not PJT's fee is reasonable on an economic basis. Then the second page, which is Page 4 -- I believe this is out of some board deck -- is a

fee study of select debtor engagements, again, to give the board and management perspective on what the market is for similarly-sized and recent vintage. We don't go back nine or ten years on this. This market is always evolving. So we went back through 2015 through 8/18, which is when this, I believe, was posted to the management and the board. We looked at $300 to $800 million of prepetition debt. We also included CHC and Waypoint because they're the most recent helicopter deals. They also happened to have either Houlihan and/or PJT involved, so we thought that was just another sort of relevant data point that the board and management would want to know about.

Q And what is the importance of this document?

A How should I say this? I guess, as a board member, and management, but I would want to make sure, if I'm retaining a professional that's paid on a contingent fee basis, that there's a market for the fees I'm approving. And so the purpose of this document is to provide that.

I should point out, in particular, on Page 3 -- in fact, I think exclusively on Page 3 -- Page 3 is a collection of comps, if you will. We actually ran those from $300 million to $700 million. Some of these are -- and some history is appropriate. PJT was advising the Ad Hoc Noteholders prior to taking on the representation of the Unsecured Creditors' Committee. So this was when they came to us and said, we'd

like $150,000 a month and a three-and-a-quarter, a $3.25 million transaction fee. We approved it as requested. No changes, no negotiating. Approved the economics. I think Mr. Califano and his team had some tweaking to do on the letter.

Some of these comps, not all of them, were provided by PJT. So, and then others were added by my team to just give a broader sample set and to essentially battle-test. And based on this, we decided that PJT's fee, relative to Houlihan's fee, was fair, especially when you look at their fee -- or I'm sorry, others, some of theirs, some of ours, relative to debtor-side advisor fees. That's on Page 3. We deemed it to be appropriate.

Q And from where did you get the information used to prepare the survey?

A Two sources. The PJT -- there's another document that's not in front of me right now. PJT sent us their comp set. It was a much smaller comp set. I want to say it was seven or eight. So we included those, and then we added to it. So part of the source, if you will, was PJT.

I will tell you, I did not have my guys go check their data. We just accepted it as laid. And then we added to it from our own database. We maintain a database on fees: creditor side, Unsecured Creditors' Committees, ad hoc committees, and debtor side. So it's a combination of those two, if you will, sources.

Q And does this chart fairly summarize the contents of more voluminous records?
A I can't tell you whether it fairly summarizes the information PJT relied on. We just took it at face value. But it fairly summarizes the information from our database.
MR. HYNES: Your Honor, we would move Exhibit 35 into evidence.
MR. LEBLANC: No objection, Your Honor.
THE COURT: 35 is in.
MR. HYNES: Thank you, Your Honor.
(Debtors' Exhibit 35 is received into evidence.)
BY MR. HYNES:
Q Mr. Niemann, can you please go back to Exhibits 29 and 30 in the binder?
A Yes, sir. 29 and 30?
Q Uh-huh. Once you've had an opportunity to look at those documents, can you tell me what they are, if you know?
A Yeah. 29 -- yes, I'm sorry, yes, 29 is the application of the Debtors to employ and retain Houlihan Lokey Capital, Inc. as investment banker nunc pro tunc to the petition date of March 14, 2019.
I am -- let me just make sure. It also has a proposed order that's been revised, but a proposed order attached to it. That's what 29 is.
Oh, I'm sorry, the Niemann declaration. That's what I was

looking for. So, my declaration is also part of 29. And then the exhibits to my declaration, which would be our qualifications of our principal professionals, and then there should be a relationship -- hold on just a second, I'm sorry -- interested party list that we received. That's Exhibit 3. And then there's a relationship with interested parties, Exhibit 4. And that is the totality of -- I did. I went into 30. I'm sorry. I was -- so that's the totality of the application.
Q Yep. Just for the record, though, is it fair to say that your declaration is Exhibit -- Trial Exhibit 33, which also serves as Exhibit B to the motion to approve the Houlihan Lokey engagement letter?
A I'm sorry, declaration -- 33 is the declaration of Mr. Lewis, Martin Lewis, in support of the Committee's objection. So that is definitely not mine.
Q Exhibit 30.
A Oh, 30? I thought you said 33.
Q Uh-huh.
A Yes. My declaration.
Q Okay. On Exhibit 30, can you please turn to Page 10 of 40 if you're looking at the top right-hand corner of that page?
A I'm there.
Q And what is this document?
A This is our -- I referenced it earlier -- our amended and

restated engagement letter, it's dated January 6, 2019, between Houlihan Lokey and the company.

Q Can you turn to Page 26 of 40, please?

A Yes, sir.

Q Is that your signature?

A It is.

Q Okay. And do you recognize the signature below it?

A It's Mr. Gonsoulin's. He's the chairman of the board and the chief executive officer of the company.

Q All right.

MR. HYNES: Your Honor, we would move to have Exhibit 30 and Exhibit 29 put into evidence.

MR. LEBLANC: No objection.

THE COURT: 29 and 30 are admitted.

MR. HYNES: Thank you, Your Honor.

(Debtor's Exhibits 29 and 30 are received into evidence.)

BY MR. HYNES:

Q Can you, please, Mr. Niemann, turn back to Page 10 of 40? That's the first page of your engagement letter.

A I'm there.

Q Okay. Could you please walk the Court through the key provisions of your engagement letter?

A Yes. And I'll just keep it high level. First is scope of services. And this was a little different because there was more analytic/advisory/transactional. Typically, we just lump

them all together, you know, ten, fifteen bullets. This one, it was important that we were able to provide some of the analytic and what I would consider somewhat consultative services for the company, so that they didn't have to hire another specialist, that we could do scoop to nuts. So one thing that was different about this, as I think about it, was there was more negotiation around scope. They wanted to make sure we were going to be delivering on what we needed to deliver from an analytic and consultative perspective.

The fees are set forth in 3. The monthly retainer of $200,000 with a credit after I think it's six months. It's the seventh month and thereafter. Then the transaction fees. There's a forbearance transaction fee, a financing transaction fee, a recapitalization transaction fee. That's really a restructuring transaction fee. We call it recapitalization. Or restructuring, sometimes. Sale transaction fees. This was a little more structured since we had the public M&A process underway.

The other important aspects of this, certainly from Houlihan's perspective, is the definition of transactions. That's Paragraph 5. The characterization of multiple and/or complex transactions, Paragraph 6.

There are some provisions here that require that we get retained under 328 of the Bankruptcy Code. That's important to us and I think any other sophisticated investment banker.

We've got some other provisions around financing transactions, and then near and dear to our general counsel's heart is indemnification and whatnot, which is back in Paragraph 18.

Q Okay. Would you characterize any of these provisions as unusual?

A No.

Q Can I direct your attention to Paragraph 6, please, Mr. Niemann, that you can find that on Page 16 of 40 of the exhibit?

A Yes, sir.

Q Are you with me?

A Yes.

Q Okay. Can you please explain the treatment of multiple transactions as set forth in the engagement letter?

A Yeah. This is what's intended by this language. And I will admit it's not the best-written provision and we've just never got it any better-written. But the intention here is we can't get paid for the same transaction twice. It would be inappropriate. We would never expect to do that. So if there's some debate as to whether something is, let's say, a sale transaction and a restructuring, then the way that debate is resolved is if it -- if it could be both, okay, and a lot of times it could be, if you're running a sale process at the time you're doing a restructuring, the calculated fee that is

the greater is the one we get, but we cannot get both fees.

Q Are you familiar with the Blue Torch transaction?

A Yes, I am.

Q Are you familiar with the allegation made by the Committee that Houlihan Lokey may claim multiple treatment of that single transaction?

A Yeah. I was surprised by that, but yes, I am familiar with that.

Q Do you consider that a valid concern on the Committee's part?

A The reason I was surprised was because I told them point blank during I think my deposition, so I was under oath, but it doesn't matter, we have no intention, more importantly, we've told the board and management this, we have no intention of procuring an additional fee for the reinstatement, if that's what happens, or impairment, or whatever happens with Blue Torch. We've been paid on Blue Torch. We were paid $1.4 million prepetition. We do not intend to receive any further fees with respect to the treatment of the Blue Torch financing.

Q And does that remain Houlihan Lokey's position as you sit here today?

A It will always be our position, yes, sir.

Q Can you please explain the results of your firm's review as to whether any of the relationship set forth in your

declaration account for more than a certain percentage of your firm's revenue?
A Yes. This was actually a request of the United States Trustee here, among other requests, some of which are reflected in the modified order. But one was to make sure at some threshold, so we went -- I have to say, I think it's the first time I've been asked to do this, so -- but we did go back and check, and I am prepared to represent today, and this was the request of the United States Trustee on the record, that no one relationship constitutes more than 2.5 percent of our annual aggregate revenue. And that, I believe, is through year-end '19, and we're a March year-end.
Q Thank you. Is there anything in your declaration or that was filed with the application that you believe is inaccurate or in need of revision?
A No.
Q Okay.
MR. HYNES: Your Honor, I know it may be a little bit unusual, but I understood from the e-mail that the Court sent on Friday that it was interested in streamlining the examination today. So at this point, although technically it would be rebuttal questions in response to the purported expert put up by the Unsecured Creditors' Committee, I would just as soon get Mr. Niemann's reaction to that report out now and just reserve a small amount of time, if necessary, after

the Unsecured Creditors' Committee has put up their witnesses.

THE COURT: Mr. Leblanc?

MR. LEBLANC: I don't think that's appropriate, Your Honor. If he's going to reserve time anyway, he should just -- if he has something he needs to rebut after cross-examination of Mr. Lewis, he should just put him on.

THE COURT: Sustain Mr. Leblanc's position.

MR. HYNES: Okay. Thank you, Your Honor. With that, Your Honor, I have no further questions for this witness.

THE WITNESS: Thank you. Should I leave --

THE COURT: Cross?

MR. HYNES: Yeah, you can keep them.

THE WITNESS: Oh, cross, sorry.

THE COURT: You may proceed.

MR. LEBLANC: Thank you, Your Honor. Andrew Leblanc of Milbank on behalf of the -- proposed counsel for the Official Committee of Unsecured Creditors.

CROSS-EXAMINATION

BY MR. LEBLANC:

Q Mr. Niemann, I'd like to begin just by calculating the fee that you would earn in this case, for the benefit of the Court, under the plan that's proposed. I'd like to do that, okay?

A Okay.

Q All right. So, and let me, before I do that, you filed a

valuation -- the Debtor filed a valuation on Friday and you provided us a report with respect to that valuation yesterday; is that correct?
A They didn't file a valuation. They put valuation numbers in the disclosure statement on Friday.
Q Okay.
A And we gave you our valuation report that we shared with the board.
Q Okay. And the valuation, just to round it off, it's around $500 million. Is that right? Total enterprise value?
A It's $487.5 million.
Q Okay. I may use $500 million for the ease of math later, but $487.5 million. Now, one of the exhibits in your binder, the binder that you have there, is Tab 37.
A I'm there.
Q And, again, I just want to use this for the purpose of seeing if we can agree at least on the math here. You recognize this document, right?
A I believe this was one, either the original or the revised version of an Exhibit A to Mr. Martin Lewis' declaration. I don't know if this was the original one. I think there was some error and it had to be corrected. So I don't know which of those two it is. So, but I recognize -- I recognize this generally.
Q Okay. And the reason -- you didn't include a calculation

in your declaration of the fees associated with this plan, the plan that's been proposed, right?

MR. HYNES: Your Honor, objection. Outside the scope of my direct. I just offered the Court the opportunity to talk about Mr. Lewis' report. Your Honor decided that we should put on our witnesses sequentially and then proceed in that manner. And now the Creditors' Committee is asking Mr. Niemann about the rebuttal report that I wasn't allowed to ask questions about.

THE COURT: Response?

MR. LEBLANC: That's just inaccurate, Your Honor. I'm exploring -- and I was just ask -- asking the question as to why I'm using this document. I'm exploring the fees that they're seeking approval of today from this Court. This is an illustration of that that I'm going to walk through with him. This isn't a -- this isn't an opinion of Mr. Lewis'. It's just the math.

THE COURT: Overruled.

BY MR. LEBLANC:

Q Okay. The question I just asked, Mr. Niemann, was you didn't provide a calculation, a build-up like this of the fees associated with the plan that's now proposed by the Debtors, right?

A I'm sorry. In -- at what point in time?

Q Well, at the time that you were retained, did you do that?

A We didn't have a plan when I was retained, so no.
Q At any point since then, have you done that?
A I could -- if you're asking me, could I calculate the aggregate fees Houlihan would get under the plan as proposed by the Debtors, the answer is, yes, I could do that.
Q Okay. The question wasn't could you do that. My question was, have you done that?
A I probably do it every day, yeah.
Q Okay. And have you presented that to the board in this -- the board of the company?
A Yes, we've discussed it.
Q But have you presented a calculation to the board of the company of what the -- what Houlihan's fees would be under the plan that's proposed?
A If your question is, have I presented in writing a presentation to the board, the answer is no. Have I presented to the board the quantum of our fees, the answer is yes.
Q Okay. Now, let's just walk through what you have there in front of you, Exhibit -- Debtors' Exhibit 37. The first column, let me just use the column on the left. Do you see that? Assumes an emergence by September 11, 2019. Do you see that?
A I don't. I'm sorry, where?
Q In the black.
A Oh, the black? I was looking to the left column.

Q Fees Assuming Confirmation.
A You're saying the far right column is the left.
Q I'm sorry.
A Yeah.
Q The two substantive columns on --
A I see that, yes.
Q Okay. All right. And so, just using that, the first item there is prepetition monthly fees, $460,000. Is that accurate?
A I'd have to go back to my declaration, but it sounds directionally correct.
Q Sure.
A And then $1.4 million for the Blue Torch facility prepetition. Is that right?
A It wasn't a debt, but yes, there was a Blue Torch prepetition term loan that funded the day before Chapter 11, and we were paid two percent on that $1.4 million.
Q And the, again, the next line is postpetition fees only. Do you see monthlies there of $946,000? Do you see that?
A I do see that.
Q Does that seem in the right range? Before crediting? Crediting is down at the bottom. Before crediting?
A I'm assuming that's six months less crediting, because it would be a round number. It's two hundred grand times -- I'm assuming 9/11 is 180 days. I don't like that date, but 9/11.

I'd rather say 9/12 or 9/10. So I'm assuming what you're doing here or what Mr. Gal -- I'm sorry, Mr. Lewis did was 180 days because that's when our pace premium terminates. So 180, which is roughly six months, times 200 is a million two, so there must be some credits driving it down. That's what I'm guessing.

Q All right. We'll let him deal with that. But, generally, I just want to try to get a sense for the Court of the order of magnitude of the Houlihan fee. The next line is the recapitalization transaction fee. Do you see that?

A I do.

Q That's the $6 million requested plus the 15 percent speed premium, right?

A We call it a pace premium, but yes, it's 1.15 times six.

Q Okay. And so, that is $6.9 million, right?

A That is correct.

Q All right. And then the next fee is the financing fee for the exit ABL, because the plan contemplates a $150 million exit ABL; is that right?

MR. HYNES: Object to the form of the question. Your Honor, object to the form of the question.

THE COURT: Do you want to just restate your question?

MR. LEBLANC: Sure.

BY MR. LEBLANC:

Q Does the plan contemplate an exit ABL of $150 million?
A It contemplates that we will explore that raise. It's not definitive that it will be $150 million. Could be less, frankly. But the plan speaks to the potential of $150 million ABL being raised.
Q Okay. And if you do raise it, at least until this morning, until the 30 percent reduction that was described to Court -- in the court this morning, that $3 million number there, that's an accurate calculation if that ABL is raised, correct?
A That's not correct. It's 1.4 percent on $150 million.
Q Well, and my -- before you reduced it by 30 percent, the $3 million that was there, it was two percent times 150, correct?
A But it's -- correct, but it's now 1.4 percent.
Q Okay. And you have -- you agreed to that yesterday; is that what I understand?
A We've been discussing this with the restructuring committee and management, frankly, certainly in earnest over the last week or so since your objection has been pending, but we've always told them, if there's ever a need for us to discuss things, we'll discuss it, as I do with every client. So I don't know, I guess arguably it's been sort of out there as a possibility, not these percentages and with any precision, but the possibility that we would revisit our fee

if we ever had to.
Q All right. But when you say it was out there, it was out there between you and the restructuring committee, right?
A I let every one of my clients know: If there's ever an issue with our fee, we will discuss it.
Q Okay.
A Because you can't document everything in an engagement letter.
Q Let me just try to -- let me try to cut through it. We didn't know about it until Mr. Califano announced it in court; isn't that right?
MR. HYNES: Objection. How could he know that?
THE COURT: Overruled.
THE WITNESS: I attempted to engage with you guys, certainly in earnest over the last month, ever since you indicated that you were going to object to our fee. Several e-mails, several attempts. And you chose not to take me up on it. So I don't know if you knew. I wanted to share with you the possibilities, but you never took me up on it.
MR. LEBLANC: Your Honor, move to strike as nonresponsive.
THE COURT: Sustained.
MR. LEBLANC: Okay.
BY MR. LEBLANC:
Q You didn't tell us that you were agreeing to reduce your

fees before it was stated in open court today, correct?

A That's an arrangement between Houlihan and the company. So, no, I did not tell you.

Q Fair enough. Okay. So let's just use the numbers that are on the page, which reflect the agreement that we were aware of until 9:15 or so this morning.

So the next one is the Blue Torch exit facility, and that's the one that you're saying definitively that you would not take today, correct?

A I think I said definitively during my deposition by Mr. Stone that I wouldn't, but yes, I'm still definitive about that today.

Q Okay. And then the next line is the rights offering. And that's the -- under the plan, there's contemplated a $70 million rights offering, correct? And I know it's been apparently withdrawn. We haven't seen that, but Mr. Califano has said that. But as of yesterday, there was proposed the possibility of a $70 rights offering, correct?

A It's -- as of yesterday, but not as of today.

Q Okay. And on that proposed rights offering, if it happened, you would earn a fee of $4.2 million. Is that right?

A It was six percent. It's now 4.2 percent. But, yes.

Q Okay. And then there's the issue of the crediting of monthly fees. So, with the exception of the $1.4 million Blue

Torch postpetition financing facility, the calculation here of $16.2 million, that's accurate for the fees that Houlihan would earn, minus the $1.4 million; isn't that right? Prior to the changes that you made today?

A It's just math, so -- and I haven't spot-checked the credits, you know, so that 946. But trusting Mr. Galler, I'm sorry, Mr. Lewis' math, this is theoretically possible.

Q Okay. And similarly -- well, and when you say theoretically possible, this is -- these are the fees that would be earned under the plan that was proposed, at least as of yesterday, both with respect to your fees and the contract in the plan, right?

A I disagree with that.

Q In what way?

A Until we get the capital in, if your clients are providing the capital, they might condition the capital on certain things. So, you know, there's plenty of cases where, notwithstanding these theoretical fees, that the creditors -- if asked the question, I could testify on this -- had asked the advisor, would you consider taking a lesser fee?

So we're always -- so this is theoretical. You know, we're in the business of raising capital for our clients and it's important that capital gets into the client. And so if there were conditions put on that capital, we'd cross that bridge when we came to it. But this is theoretically

possible.
Q Right. And if you got Court approval today under 328 of these fees, not only would it be theoretically possible, it's what you would be entitled to under the Court's order; isn't that right?
A Not today, no.
Q If -- if the plan that was -- that proposed yesterday --
A I'm sorry. I misunderstood the question.
Q Sure.
A Yeah. I guess if we go back to yesterday, that's theoretically possible.
Q Okay. All right. And then the -- I know you dispute the relevance of the prepetition fee component, and we'll talk about that in a bit. But the $18.1 million, that would reflect the all-in number, including postpetition and prepetition fees, again, minus the $1.4 million, right?
A I'm sorry. I did not understand your question.
Q Sure. You see, you see Mr. Lewis has a total fees earned of $18.1 million, right below the $16.2 million? That includes the pre and the postpetition?
A I see that.
Q Okay. And so if you take off the second $1.4 million for Blue Torch that we talked about that you're not seeking, that would be $16.7 million, roughly, right?
A I'll trust your math.

Q Okay. It's just math, right?
A I mean, do you want me to pull my -- I trust you.
Q No. Okay. And is it your testimony that $16.7 million would be an appropriate fee for a company to pay for the services that the loan would provide if that plan were confirmed?
A It's my testimony that our fees are market and these are market fees and the structure allowing these fees are market.
Q Okay. And $16.7 million -- there's no cap in your fee, right?
A What do you mean by cap?
Q You don't have an agreement as to the maximum amount of fees that you could earn from this engagement, right?
A We do not.
Q And you've seen caps in other cases, right?
A In some cases, yes.
Q Okay. And there's no crediting of any of the financing fees against the restructuring fees in this case; is that right?
A That is correct. My only hesitation is effectively it's a discount, not a credit, but the 30 percent that we agreed to with company could be deemed a credit or a discount, however you want to look at it.
Q Okay. But there's no credit -- you know what I mean by crediting, right?

A I think I do, yes.
Q Sure. Where, if you earn -- if you earn one fee, you credit it against another one of your fees. So, for example, if you earn a financing fee, you might credit that against a transaction. You understand that?
A I understand it to be let's say there's a million-dollar transaction, financing transaction fee and we give a 30 percent credit. That 30 percent, $300,000, would be applied against the restructuring fee and reduce the restructuring fee by that equal amount.
Q Okay. Now, have you done a calculation, a similar calculation to what we just did, for the plan as it existed yesterday to the structure that you have now with the 30 percent discount?
A I mean, I can. I haven't.
Q Okay. All right.
A I could do it right now if you want, but --
Q Well, I think Mr. Lewis is going to cover that, so --
A Okay.
Q -- let's -- well, let me actually ask a couple of questions along that line. The 30 percent discount that you have, that wouldn't affect the prepetition Blue Torch fee that you've already received, correct?
A No, it would not.
Q And that wouldn't affect the $6.9 million transaction fee

that you would receive with the pace premium, correct?
A It only affects the financing transaction fees in our engagement letter. Postpetition financing transaction fees.
Q All right. And the company's EBITDA last year was approximately $40 million. Is that in the right range?
A I'm pausing because I'm not sure it's public, what our LTM. And all of this is in our valuation report, which we're pretty sensitive about dissemination. But if you would like me to assume for purposes of this testimony that the company's trailing EBITDA is $40 million, I'll make that assumption.
Q Not trailing. I was talking about 2018, which I think those numbers -- maybe they're not. It doesn't matter. I'm just trying to get a sense, just, again, to compare this. This is something in the neighborhood of a $40 EBITDA business today. Is that generally directionally in the right way, right direction?
A I'm happy to make that assumption for purposes of this testimony.
Q Okay. And so is it your testimony that, as it was constructed, before the 30 percent -- yesterday, when the board had approved it originally, that paying $16.7 million in a fee to Houlihan is appropriate for a company with roughly $40 million of EBITDA? So, paying 40-plus percent of its annual EBITDA to Houlihan as a fee, that that's appropriate?
A Never thought of it that way, candidly. My testimony is

that the rates and structure are market.
Q Okay. All right. Now, let's talk about the -- some of the individual components. And I'm going to use the same exhibit that you used, which I think is Tab 35. Just let me know, Mr. Niemann, when you have that.
A I'm there.
Q Okay. So, Tab 35. This is the fee study that you presented to the board, correct?
A Yes.
Q All right. And the board didn't have a separate advisor providing them with fee studies to determine what was market for an investment bank, did they?
A I don't understand your question.
Q Sure. Did they hire a different consultant to opine or to give advice on your fee, or was this the information that they received?
A I don't think I've ever --
MR. HYNES: Sorry. Object to the form of the question, Your Honor. It's compound.
THE COURT: Overruled.
THE WITNESS: I don't think I've ever seen a board retain a consultant to negotiate our fees or evaluate, and in this case, they did not.
BY MR. LEBLANC:
Q Okay. And so -- and Mr. Del Genio didn't offer an opinion

on your fees, right?

A I don't know if he did or he didn't.

Q Okay. Now, the -- you mentioned a minute ago in some direct -- response to some direct questions, the work that's on Page -- what you said Page 3, the first page of Exhibit 35. That was an analysis that you did comparing the PJT fee to the Houlihan fee; is that right, generally?

A The purpose of this page was to provide some level of comfort that the fee that PJT and Milbank asked for for PJT was fair.

Q Okay. All right. So the page that was provided to determine whether Houlihan's fee was fair, that's really the second page, Page 4, right?

A Yes.

Q Okay. Now, so let me just start with the monthly fee. The monthly fee that you've proposed is $200,000 per month, right?

A Yes.

Q And if you look at the -- and I forget, do you remember how many, how many entries you have on this sheet? I don't need you to count, but do you know?

A There's probably 30 or 40.

Q 30 or 40? Yeah. In those 30 or 40, there's only one that's listed as having a fee of more than $175,000; is that right? Before you -- and we'll talk about CHC and Waypoint in

a second. But before you get there, in your comparable list, there's only one that has a fee of greater than $175,000, right?

A On Page 4 -- we don't have it on Page 3, but -- I don't want to speculate, but perhaps on Page 3 there's some with $200,000-plus, although I do point out that CHC and Waypoint were, in aggregate, well north of $200,000.

Q Okay. And let me, just to be clear about that, when you say in aggregate, just so the Court understands, you're saying in aggregate because there were actually two different people earning a monthly fee in those cases, right? Seabury and either your firm or Houlihan -- or PJT, correct?

A Yes. Seabury was a co-advisor in each of those. We don't have a co-advisor here.

Q Okay. But -- and I just looked at Page 3. I don't see one there, unless I'm missing it, that has a monthly fee over $150,000. And there's only one on both pages that has a fee of over $175,000, right?

A I think you pointed that out.

Q Okay.

A Yeah, the industrial company that we kept anonymous.

Q Right. And so -- and I did have a question about that. The industrial company you kept anonymous, why did you keep it anonymous?

A Because it's not a public engagement letter because we

kept that company completely out of Chapter 11 and got 100 percent consents. PJT was the advisor for the company. I was the advisor for the secured noteholders.

Q Okay. So that was an example of a company that didn't have to come before a court asking for approval of its investment banker fees, right?

A No, they did not. We never filed Chapter 11.

Q Okay. All right. And so -- and what you do at the bottom -- and, again, at the very bottom, you calculate a market mean implied fees, and you determine what the percent of debt, cost of the monthly fees are for each of these companies, and then you aggregate them in a mean and a median; is that right?

A Yes.

Q Okay. Now, did you reach a --

A I think we just had mean on this. Oh, yeah, median is on this, and then we brought the mean down. But, yes.

Q Okay. Did you determine that the monthly fees were correlated to the size of the debt?

A That's a way to look at it.

Q Well, but did you -- did you statistically determine that there is a correlation between them?

A There is.

Q Okay. If you look at it -- as I look at the list, and you've helpfully organized it from smallest to largest on this, right? That's how it's stacked, right?

A That's how I organize it, yes.
Q Okay. And so by organizing it that way, we can see that the smallest company on the chart of -- I -- Everywhere -- I didn't bring my glasses, so I'm going to -- correct me if I get this wrong, but Everywhere Global has a percent of debt of .042 percent and the largest company has a percent of debt of .019, right?
A Correct.
Q And you can see, just by eyeballing it, you can see that the bigger the company gets, the smaller that percentage of fee becomes. Isn't that right?
A That's the correlation, yes.
Q Okay. So, in fact, it's not correlated to the size of the debt, though. Isn't that right?
A I disagree with that.
Q Okay. Well, if you look at the companies that are comparable in size to what you opine that the prepetition debt here is, if we just look at the companies that are from $750 million to $796 million.
A Do you mind if I just -- let me find -- seven hundred -- I'm sorry, what was the number? Seven --
Q $750 million.
A Okay. I see that.
Q So that's the Woodbridge Company, --
A Yes, sir.

Q -- down to Aspect. Do you see that? And let's -- let's --
A Yeah. To the bottom one, yes.
Q Let's just exclude -- I mean, you can do with it what you want, but --
A No, I just wanted to know which ones you're talking about.
Q Sure.
A I got it.
Q So, from that list, there's -- if -- the only ones that came before a court asking for approval of a fee higher than $150 million was the Patriot Coal Company, asking for a fee of $175 million, correct?
A My hesitation is I don't know if it was the ask or the -- I think these are actual court orders. So it might have been a higher ask, is my only reservation with your question.
Q Okay.
A But the court order that we reviewed approved a fee of $175,000 a month in Patriot Coal for Centerview.
Q Okay. And, but for each of the other ones, the orders that you approved -- approved -- the ones that had orders only approved a fee of $150 million, right?
A With the exception of PJT's and the industrial company. Oh, I'm sorry, you're asking in court?
Q In court. Yeah.
A That is a correct statement on this sample set.

Q Okay. All right. And so you determined, in looking at that, that the market was $200,000 a month for monthly fees based upon your analysis; is that correct?
A That's not what I determined and that's not my testimony.
Q Okay. Is it your testimony that your monthly fee is a market fee?
A My testimony is we are paying -- being paid $200,000 a month. It is fair for the work we're doing. And, yeah, I guess I would testify it is market.
Q Okay. Well, that -- then --
A I misunderstood your question.
Q Fair enough.
A Sorry.
Q Now, I want to talk for a second about the debt calculations that you have on here. One of the companies you have is -- you do show CHC and Waypoint. For CHC, you show a debt -- prepetition debt of $1.102 billion. Do you see that?
A I do.
Q Mr. Del Genio was the CRO in CHC, correct?
A He was.
Q Did you look at his declaration in that case as part of this?
A No.
Q Do you know what his declaration says about the size of the debt?

A I suspect it's $500 million dollars higher, give or take.
Q Okay. And why do you suspect that?
A Because that's probably the ABL that we, Houlihan, handled on behalf of the company, since we're the new sponsors. So I am aware that I think it's in the neighborhood of $1.6 billion --
Q Okay.
A -- as opposed to $1.1 billion.
Q Okay. But you used $1.1 billion for your calculations?
A I did.
Q And if you'd used $1.6 billion, that number would have come down, correct?
A It would.
Q And why didn't you use it?
A Because PJT didn't really handle that part of the case. They handled other aspects of the case.
Q But you're -- you're comparing the amount of debt on the company's balance sheet to -- or the amount of debt on the company to the fees that are earned by its advisors, right?
A Yes. This is judgment on my part. For instance, in CHC, Seabury handled the lease negotiations to a point, then we took it over. In this case, we're handling the lease negotiations, so I include it.
I don't know that I made that judgmental decision on any other comp, but CHC I'm familiar with. I was in CHC. So I

made that judgmental decision. But you are correct. If you used $1.6 billion, it would lower the percentage.
Q Okay. And -- but you didn't use $1.6 billion, you used $1.102 billion, which was a year-old number, right?
A I don't understand your question.
Q That was -- that was not the number that the company had when it filed for bankruptcy and when it sought approval of its --
A If you exclude the ABL, I think it was.
Q Okay.
A That's my point.
Q All right. If you excluded some portion of the debt on their balance sheet?
A The portion of the debt that they, frankly, weren't really handling, yes.
Q Okay. Now, another issue that is addressed here is you actually use, for -- for PHI, you use a prepetition debt amount of $761 million, right?
A Yes, sir.
Q And that includes three components. One is the $500 million prepetition note facility, right?
A Yes, sir.
Q The second is a $130 million Thirty Two loan facility from Mr. Gonsoulin, correct?
A Yes. I'm sorry.

Q From Thirty Two Investments. I'm sure that's what the objection was.

And the third, you add to -- you add to PHI's prepetition debt balance the cost of -- the aggregate cost of operating leases for its aircraft. Is that right?

A It's the nominal amount of the operating leases. It's actually give or take 130. We actually -- at the time we did this, we had a couple of other leases, I think, in that ultimately were not part of the Debtors. So the number is a little less now. But those are the three primary components.

Q Okay.

A Or three components.

Q All right. And you know that Mr. Lewis, in his analysis -- and I'm not -- I'm just going to ask you this. Well, let me actually withdraw that.

The Debtors represented to this Court in their first-day declaration that their prepetition debt balance was $630 million plus the Blue Torch facility, correct?

A I don't -- I mean, that -- if you exclude the leases, that is the amount. I don't know what the Debtors represented. I mean, you'd have to point me to the document you're referring to or --

Q The Debtors' books -- the Debtors' financial reporting, that doesn't report those operating leases as debt of the company, does it?

A I think it's reported as obligations.
Q Okay. But it's not reported as debt in the same way that the notes are?
A That's correct. It's not.
Q Okay. And your fee study, you didn't make any effort to determine what the comparable operating lease obligations were for any of your comparable companies; is that right?
A I only know of CHC as involving a significant restructuring of leases. I don't know if any of these other 30-plus comps had that component of the restructuring. So I did not go back and check every one of these to see was there a big lease restructuring negotiation. And, again, like if it was a retailer, I wouldn't do that, because that's -- you're not -- it's not the same type of restructuring. These leases are very specialized. This equipment is very specialized. It takes a very specialized advisor to handle it. That's why Seabury, for instance, has been in some of these other cases. They have that specialized experience.
Q Okay. Well, let's just talk about CHC for one second. CHC leased 163 of their 230 helicopters; is that right? Is that consistent with your recollection?
A It was a high percentage.
Q All right. And do you know that they reported $1.3 billion in nominal value of operating leases?
A I don't know, but I bet it was a big number.

Q And had you included that in addition to the $1.6 billion, that would have been more like $2.9 billion worth of debt in the CHC case; is that right?
A That -- if you're correct on the numbers, I have no reason to doubt you, --
Q Yeah.
A -- then all that math would hold true.
Q All right. And oil -- and I know this may not -- these may not be your industries, but oil and gas companies, they lease land, correct?
A Yeah. They purchase leases.
Q Right.
A Whether it's land or under the ocean floor, onshore, offshore, or wherever they're getting them, but, yes.
Q And you didn't go back to determine how much the operating lease -- how much of those operating leases should be included in their debt numbers, right?
A I wouldn't, because those aren't typically a core part of a restructuring. It's really the funded debt. So the answer is no, I didn't, but there's a reason.
Q Okay. And similarly, you mentioned retailers. Retailers routinely deal with leases in bankruptcies, right?
A Completely different animal, but that's correct.
Q All right. And you didn't make any effort to include those lease obligations as part of the debt for those

companies, right?
A I wouldn't.
Q Okay. And then, lastly, you were here at the first-day hearing. I think it was Mr. Califano who said that REFCO was the -- probably the one lease that they're going to reject. Do you recall that?
A Is that Regions?
Q Regions Finance, yeah.
A I remember him saying that, yes.
Q Okay. And does -- assuming that to be true, whatever -- whether it's true or not, is lease adjustment going to be a significant part of the case for the Debtors?
A I would say it's material.
Q Okay. And thus far the Debtors have filed one motion to reject a helicopter lease, right?
A I think it was Regions, if I'm not mistaken.
Q Right. And that's one out of 17 helicopter leases, right?
A Yeah. It's 15 lessors. I think it's 17 leases. I think that's correct.
Q But notwithstanding the fact that you didn't -- your study compares the prepetition debt amounts for everybody other than your subject company; is that fair to say?
A I'm sorry, I didn't follow that question.
Q Sure. Your fee study, what we're looking at here at Exhibit 35, Page 4, it compares the funded debt amounts for

each of your subject companies. Let me just stop there. Is that right?
A It doesn't compare them. It has the funded debt amounts as of the petition date --
Q Right.
A -- for each of the comps.
Q Okay. And, but for PHI, and only for PHI, you also added to the funded debt the nominal value of the lease obligations. Is that right?
A PHI -- yes.
Q Okay.
A And I'm sorry. I thought you said CHC. PHI, we added the nominal amount to arrive at $761 million. That's correct.
Q And you did it only for PHI, the subject of your study?
A Yes, sir.
Q Okay. And if you hadn't done that, am I right that each of the numbers as to what -- the 204 that you calculated as the market mean implied fee, if you used, instead, 631, and multiplied it -- even if you multiplied by that mean, that would result in a lower number, right?
A Yes. I could do the math if you'd like me to.
Q Why don't you do the math? Let's do the math on that one.
A You're using 631?
Q 630, but I think -- 630.
A Okay. I'll use 630, then.

Q Yeah.
A Times the mean, let me find it, of .027.
Q Right.
A That would imply -- I think it's $170,000. I'm a decimal point off. $170,100.
Q Okay.
A Does that agree with your math?
Q That does. Yeah.
A Thank you.
Q Okay. And similarly, the -- if you did the same exercise with respect to the restructuring fee -- we don't have to do it, just in the interest of time -- that would similarly come down if you excluded the capital lease obligations -- or, I'm sorry, not the capital lease obligations, but the operating lease obligations, right?
A If you lower the constant, which is petition date debt, then the aggregate would go down, because you're applying a fixed -- the percentage is a constant as well. But, yes, mathematically, it would come down.
Q One of the companies that isn't included on here is Erickson. Why is that?
A That was a -- I'm trying to think why I excluded it. I was involved in that as well, as was Judge Hale. We received the same fee as Imperial, the advisor there. I want to say it was $2 million for each of us. We really kind of worked that

deal together, collectively. We made a lot of progress prepetition.

And so that deal I would view the aggregate fees -- and it was a very efficient case, if I remember correctly -- I view those aggregate fees as sort of the debtor-side fees, even though we were representing a secured creditor, but it was a very consensual and efficient case. And so I don't -- I'm trying to remember, candidly, whether I purposely said, let's keep it off. I think I -- I might have actually applied judgment on that one. I'd use four million. I'd use the aggregate of the two.

Q Okay. There, Erickson was -- I'm sorry, Imperial was paid a monthly fee of $125,000?

A I don't remember. It sounds directionally correct. And I don't remember the aggregate debt. It may not have met the $300 million. I think it did, but I don't remember if it --

Q Does $561 million sound correct to you?

A Okay. Then, then it would. It would fall within this range.

Q Okay.

A Yes, sir.

Q And the -- Imperial's fee there you said was a $2 million transaction fee, right?

A Yeah, with all this -- yes, if I remember correctly.

Q And they also had a cap on the total fees they could earn

of $3 million. Do you recall that?
A I don't recall that.
Q Do you dispute that? If I represent to you --
A I'd have to look at their engagement letter.
Q Okay.
A But I remember negotiating their fees on behalf of the -- their secured lenders.
Q Okay. Now, I was next going to talk about the restructuring fee, the $6 million fee that you've requested, but I think we've -- that's calculated in the same way that you did the -- that we just walked through on Exhibit 35, Page 4. Is that right?
A It's analyzed the same way, yes.
Q Analyzed the same? Okay. And so to the same extent with respect to the -- if you excluded the capital leases where you added the additional debt at CHC, it would have the same effect on the analysis?
A Mathematically, mathematically, you would be using a different debt level.
Q Okay.
A Or obligation level.
Q All right. Now, let's talk about the financing fees. You, in this analysis that you presented to the board that's reflected in Exhibit 35, you don't include any analysis of the comparable financing fees in other cases. Is that right?

A Yeah, this did not have that.
Q Right. And in this case, and we've looked at it through Mr. Lewis' Exhibit A -- 30 -- Page -- Tab 37.
A I'm sorry. Do you want me to go to another tab?
Q If you want to look at Tab -- I'm just -- I'm reminding you that we talked already about the aggregate fee under the plan, at least as it was formulated yesterday, and your fee as it was yesterday. Do you recall that?
A Do you want me to go to thirty --
Q Sure. Go, go to 37.
A I'd rather not try to recall testimony --
Q Oh, no. That's fine. Go to 37.
A -- in the midst of testimony, if you don't mind.
Q Go to Tab 37.
A So, yes, I'm at Tab 37.
Q Okay. And the only reason, the point I wanted to make here is we calculated, if you exclude the Blue Torch facility, a second financing fee on that, an aggregate fee under the plan as proposed yesterday and your -- and the fee as it was approved by the board of $16.7 million. Do you recall that?
A It is theoretically possible, depending on the capital raised and the length of the case, that you could get to this level of fees.
Q Okay. Now, and of that component, the financing -- I'm sorry. The financing fees make up more than half of that

total potential fee; isn't that right?
A Well, it's 6.9 million, plus prepetition, plus monthlies. Whatever that equates to. And the rest are financing fees.
Q Okay. So, at a minimum, do you see that there's -- for the two, the ABL and the rights offering, there alone there's $7.2 million in fees for those two alone?
A I'm sorry. You're referring to which two numbers?
Q The $3 million and the $4.2 million. Those are financing fees?
A $3 million and $4.2 million equals $7.2 million, yes.
Q Okay. So, that, those fees themselves are higher than the transaction fee that Houlihan is requesting standing alone, right?
A Mathematically, yes.
Q Okay.
A They don't exist anymore, but mathematically, yes.
Q And, but you still -- you didn't present to the board any analysis of the -- in the comparable set of what the financing fees were for those comparable companies, did you?
A The reason I'm pausing, I'm trying to think. We did present -- it was just M&A fees, because there were two more pages that were presented, I don't know if you guys have it, but regarding public company M&A fees. I don't think any of our analyses had financing fees laid out.
Q Okay. And similarly, we talked about this earlier, but

you don't have crediting in your engagement letter with respect to financing fees. You also didn't show how any of the comparable companies, what crediting mechanisms were in place in those cases, did you?

MR. HYNES: Objection.

MR. LEBLANC: Let me, let me rephrase it, if that's all right, Your Honor.

THE COURT: All right.

BY MR. LEBLANC:

Q You didn't show the board, in your fee study analysis, the crediting mechanisms in each -- in any of the comparable companies that you included, did you?

A That's not on page -- on the pages we provided the board, no.

Q Okay. And you know that in some of these cases there are crediting mechanisms, right?

A Yes, I'm aware of that.

Q Okay. Similarly, you did not show the board any data about the caps that were negotiated in other cases; is that right?

A It's not on the pages that were given to the board.

Q Okay. And, again, you don't have a cap, but you know there are caps in many of these other cases, right?

A You'd have to define many, but there are caps in some cases. Yes, sir.

Q Okay. Now, let's talk for a minute about what you describe as the pace premium. Have you identified any case that you're not involved in that has a pace premium?

A Yes.

Q What case?

A I believe it's *UCI International*.

Q Okay.

A And -- if I may finish the answer?

Q Sure.

A There are what I would consider effectively pace premiums where, if things are done efficiently out of court, that there's either bonuses or fees are paid prepetition, and, for instance, the restructuring fee might get paid once you get the consents from the holders, even though a Chapter 11 is required to bind the consents. So a lot of times bankers will get the full fee or some percentage of the fee prepetition, not subject to disgorgement later, whether or not the deal clears. So that I consider, in some respects, a pace premium. And it's fairly standard.

Q You say a pace premium is fairly standard?

A The structure I just described which I believe is effectively a pace premium is fairly standard.

Q Okay. But, and you identified at your deposition a few cases that you understood or recalled had pace premiums, right?

A I'm sorry. During my deposition?
Q Yes.
A Yes, I do recall that.
Q Okay. And the Debtors have conveniently attached those. So if you could look at Page -- Tab 38.
A I'm there.
Q All right. And Tab 38 is an application that was filed by Houlihan in *Erickson Retirement Communities* with Mr. Califano as counsel to the Debtor there; is that right?
A Yes, I'm familiar with this and that's correct.
Q Okay. And the pace premium there is reflected on Page 8.
A Page 8 of the application?
Q Yes.
A I'm there.
Q Okay. And in Paragraph 17, Sub-bullet D. Do you see that?
A Yes, sir.
Q Okay. And so there it says the restructuring transaction fee shall be increased by 15 percent if the company consummates a restructuring transaction on an out-of-court basis or pursuant to a prearranged or prepackaged plan in which the restructuring transaction is confirmed in not more than six months from the petition date. Do you see that?
A Yes, I do, sir.
Q And so that pace premium there was limited to a case in

which there was a prearranged plan; is that right?
A That's not correct. You'd have to look at the engagement letter as to the definition of prearranged or prepackaged. The definition is, so long as a plan is confirmed within 180 days, the pace premium is triggered.
Q Okay. So the prearranged or prepackaged as used in that that was presented to Judge Jernigan, that's surplusage? It's just any plan had to be confirmed within six months?
A You have to actually look at the engagement letter as to what the precise definition is. This is an application.
Q Okay. And was -- do you recall whether -- was there any objection to that pace premium?
A I don't recall. We had 30-some-odd lenders. They objected to a lot of stuff. But I don't remember if this was one of it, or one of the things they objected to.
Q Okay. So, similarly, in -- behind Tab thirty -- and that was -- that pace premium was a case that you were the lead banker on, right?
A Yes, I was the senior officer at Houlihan on that case.
Q Okay. *Linden Ponds* has the same structure as the -- the same language with respect to prepackaged or prearranged, right?
A I'm sure it does. You want me to go to it, or --
Q If you want to. Or do you doubt that that's --
A I believe it did. This is going back nine or so, ten

years ago, but yes, --
Q Sure.
A -- I'm pretty sure it did.
Q And then the third one that the Debtors have included is *SandRidge Energy*?
A Yes, sir.
Q Okay. And that one has a premium if the transaction is confirmed within two and a half months of the filing of the case; is that right?
A I'd have to go --
Q Sure.
A -- refresh my recollection, but --
Q That's fine. Tab 42.
A -- I was involved in that. I'm sorry. It's 42?
Q 42, yeah.
A Yes, sir. If -- I think it's (b)(1)(A) on Page 7. I think that's right. I'd have to take a closer look. I'm sorry, what's your question?
Q My question is, that -- the pace premium there was a premium payable if a confirmation order happened in less than two and a half months from the filing, right?
A I'd have to go back and figure out what -- well, let's look at --
Q Paragraph 4 on Page 3.
A Does it have a petition date?

Q It does.

A Okay. So I'm going to trust you, but --

Q May 16th.

A May 16th. So, by July 1st, there was one level of premium.

Q Okay. And that was the pace premium that was at issue there; is that right?

A Um, (pause). My hesitation on this, this was a very negotiated arrangement. The $1.5 million discretionary was in lieu of pace, but it was made very clear that pace was important. So they're both really -- there's only one that's a pure pace premium. The other is a discretionary premium generally, but pace was an important factor.

Q Okay. Now you mentioned *UCI*, and I'm not going to -- I'm actually not --

MR. LEBLANC: I won't talk about that, because, Your Honor, this gets to one of the document issues that we had. The Debtors' exhibit list identifies this as an application to employ Houlihan Lokey in *UCI*. And my team literally spent a meaningful amount of time trying to find that, because Houlihan wasn't involved in *UCI*. So we'll deal with it when they stand up, because we didn't get -- until I walked into court, we didn't get the -- we hadn't received any of their exhibit binders, so we'll --

THE COURT: Okay.

MR. LEBLANC: I won't raise it here, and we'll deal with it on recross.

BY MR. LEBLANC:

Q But, so at least as of your deposition, when you identified cases for us that had speed -- pace premiums, the only cases you identified were ones in which Houlihan was available -- was the investment banker, right?

A The only ones I could recall during the deposition, and I'm not sure I recalled every one of them, but were ones that I personally was involved in.

Q Okay. And you've not seen a fee study done by anybody else that identifies a pace premium as a common feature in investment banker engagements, have you?

A I have not done a survey of the types of premiums. As I said, there's a fairly standard provision in a lot of engagement letters that pay, from a prepetition perspective, if things are done more efficiently, which is pace to me. But I have never commissioned that type of a survey. I've commissioned some work for this particular case, given your objections, but not a broad-based survey of the market for every possible, quote, pace premium, depending on how you define pace premium.

Q Okay. And the commission of work that you did in connection with this case, you've identified now *UCI*, but other than the three instances that Houlihan has sought in

cases that you were involved in, you've not identified any others besides *UCI* that actually have a pace premium. Is that right?

A The industrial company that we talked about earlier that PJT was involved in, --

Q Let me limit it to ones that actually filed an application for approval to a court.

A Okay. Limited to that?

Q Yes.

A I am only aware of *UCI*, which was Moelis, and the Houlihan comparables over the last ten years.

Q Okay. And so none of them -- had you included a column for ones with a pace premium here on this chart, since those don't appear, or *UCI*, I guess, actually does, only *UCI* would have had a checkmark next to it for having a pace premium. Is that right?

A I don't know. I'd have to look at that list. And I didn't go back and check if any of them had pace premiums.

Q And you didn't -- you also didn't present that to the board, correct?

A That is correct.

Q Now, I want to turn topics for a second off of -- off of your fees.

A Thank you.

Q And -- well, I'm not sure you'll be thanking me, but --

And I just want to spend a few minutes. You -- let me just try to do this in a summary fashion. You understand that the Committee has raised concerns, I think Mr. Califano even said it earlier today, with the Debtors' plan, right?

A I know in pleadings it's been called coercive, it's been called a death trap. I take those as concerns.

Q Okay. And those concerns focus on the treatment of Mr. -- they include the treatment of Mr. Gonsoulin's Thirty Two loan, the $130 million loan, right?

MR. HYNES: Objection, Your Honor. This is outside the scope. I don't know where this is going, but it doesn't appear to be tied to fee application.

THE COURT: All right. It's certainly part of the objection that's been filed. Overruled.

THE WITNESS: I believe in one or more of your pleadings there's some reference to it not being market.

BY MR. LEBLANC:

Q Okay. But --

A So I don't know if that's a concern or not, --

Q Sure.

A -- but I think that's how you've characterized it.

Q But the treatment of that loan in the plan, that --you understand that's a concern of the Committee, the fact that it's being equitized, right?

A I'm just going by your pleadings. We haven't really had

any meaningful dialogue with you about what your actual concerns are, so I'm just going by your pleadings. I know in your pleading you said -- somebody said -- you don't believe that's market.

MR. LEBLANC: Okay. Move to strike everything but the last --

THE COURT: Sustained.

BY MR. LEBLANC:

Q And you understand we've raised concerns, the Committee has raised concerns about the replacement of Whitney Bank with the Thirty Two loan, right?

A You've referenced that in your pleadings.

Q Okay. We've also raised concerns, the committee has raised concerns about the Blue Torch facility, correct?

A You reference that in your pleadings, yes.

Q And you understand that part of our position is that those loans, taken together, have created a lot of leverage against the unsecured creditors in this case, right?

A I don't know what your position is on that. It's not --

Q Okay.

A That's not in your pleadings.

Q All right. And we've taken the position that Mr. Gonsoulin is, as the friendly lender to the company, is getting better treatment than he should, aren't we?

A I don't know if that's your position. I haven't read that

in the pleadings.
Q Okay. You also, at the first-day hearing and subsequent to that, you've heard complaints that in the prepetition period Houlihan and the company didn't actually engage with the noteholders themselves, right?
A There are such allegations in your pleadings.
Q Okay. And you'll recall that we've alleged that the company wouldn't restrict the noteholders in the prepetition period, right?
A I'd have to look at the exact pleading, but there's allegations to that effect.
Q And the allegations include that what the company did was engage with our -- with the advisors and provide some limited diligence to the advisors, but never actually provided it to the noteholders, right?
A I can't tell you what the advisors shared with the noteholders because some of it was not MNPI, so I'm sure any good advisor would share what they could. PJT meets my standard of a good advisor. So I don't know what the noteholders got.
Q Okay. But you understood that the noteholders were never restricted in the prepetition period to receive MNPI from the company, right?
A My reservation is I wasn't involved in the refinancing effort that was led by UBS and Royal Bank of Canada. I know

there was some click-through confidentiality for the existing holders that were part of that process. So I don't know if there was any restriction in there. So, other than that, which I can't really speak to, we certainly, not on my watch, if you will, was there any confidentiality agreement with the existing holders. It wasn't until the bylaws which provide confidentiality, --

Q Okay.

A -- which was postpetition.

Q All right. And you were involved in recommending to the company the course of action with respect to how it would engage with the noteholders; isn't that right?

A I was among the advisors, yes.

Q And you were also involved with recommending to the company how to deal with the Whitney Bank facility and the upsizing of the secured facilities, right?

A I don't really understand that question. I'm sorry.

Q All right.

A It sounded like two questions.

Q All right. Let me show you a document.

A Can I put this away?

Q Sure.

A Make room?

MR. LEBLANC: May I approach, Your Honor?

THE COURT: Sure.

THE WITNESS: Thank you.

THE COURT: You can just bring it straight up here. Thank you. Thanks a lot.

MR. LEBLANC: Your Honor, for the benefit of the Court, the only exhibit I'm going to look at at this point with Mr. Niemann is one that the Debtors originally marked professionals-eyes-only. They have de-designated that as confidential. I don't know -- we have exhibit binders here. I don't know who's signed a confidentiality agreement, so I'm -- I would hesitate to offer it to everybody, but I am going to ask him questions, and if they have issues or concerns about the questions, they can certainly raise it.

THE COURT: All right.

BY MR. LEBLANC:

Q Now, Mr. Niemann, before we turn to the exhibit in the binder, you were engaged by the Debtors in September, early September 2018, correct?

A Houlihan Lokey was. Yes, sir.

Q And, but prior to that, Houlihan Lokey had been subject to a confidentiality agreement with the company for more than a year, right?

A I believe that's correct.

Q And you had, over time, provided the company with advice over time during that one-year period that you were subject to a confidentiality, notwithstanding the fact that you weren't

engaged; is that right?
A I'm just careful with the use of the word advice. We were spending time with the company and giving thoughts on certain things. I don't really consider it advice until we're sort of formally engaged --
Q Sure.
A -- and indemnified.
Q Your general counsel will be very happy to hear you say that.
A Exactly.
Q That's not my issue. I want to focus on a couple of weeks before you were engaged, you provided the company with an analysis of certain strategic alternatives, right?
A We provided several analyses, and so if you have something you want me to look at --
Q Sure.
A -- and it's dated a couple of weeks before we were hired, I'm happy to look at it.
Q Okay. Then why don't you turn to Tab 1 in the binder I just handed you?
A I'm there.
Q All right. And that document, just to identify it for our record, that's a strategic alternatives proposal from Houlihan Lokey dated August 22, 2018, right?
A It appears to be what we presented. I'm looking at -- it

looks like it printed a little funny on the font. But this appears to be a presentation we gave on or around August 22nd.
Q Okay. And if we skip over the Houlihan Lokey overview and go just to the --
A Which most clients do.
Q If you turn to Page 23 of this document.
A Yes, sir. I'm there.
Q And this is -- you -- this is entitled, the slide here is entitled "Overview of Strategic Alternatives." Do you see that?
A Yes, I do.
Q And I want to focus you for a second just on the fourth one, Papa's Big Brother. Do you see that?
A I do see that.
Q All right. Papa, that's Houlihan's code term, code name for this engagement. Is that right?
A It's the maritime sign for P.
Q Okay.
A Papa.
Q Okay. So Papa's Big Brother was one of the alternatives that you presented, and that was to find -- it's titled Upsize Revolver. Do you see that?
A Yes, I do.
Q And the first recommendation there was to find a friendly source of capital to take out Whitney and potentially upsize

the revolver up to $260 million. Do you see that?
A I do see that.
Q Use for either liquidity or as a carrot/stick coercion against notes. Do you see that?
A I do see that.
Q Now, you did find a friendly -- the company did find a friendly source of capital to take out the Whitney financing, right?
A That is not correct. I'm sorry. Oh, the company, not Houlihan?
Q Correct. I said the company, yes.
A Okay. I'm sorry. I -- yes. Yes, the company found a friendly source of capital.
Q Right. And then ultimately the company did upsize, through the Blue Torch facility, the senior secured facility, right?
A To $200 million, not $260 million.
Q Okay.
A Yes, sir.
Q And at the time that it did the Blue Torch facility, the capacity you concluded the company had was $70 million, right? Under their -- under the indentures, to comply with the indentures?
A In talking to the lawyers and everything, we decided it wasn't actually $260 million, it was $200 million.

Q Okay. So you -- and at the time you presented this on August 22, 2018, you believed it to be $260 million, right?
A Based on our review of the indentures, we thought there might be actually additional room, and upon further analysis and work with lawyers -- I think it was Jones Walker at the time -- we concluded that it was $200 million.
Q Right. And then at the bottom, the sort of analysis of that is, Dust settles. New sheriff in senior secured position. Could prove helpful later. Upsize capacity may be useful currency.
Do you see that?
A I don't even need to look. Yes, I'm familiar with it.
Q Okay. And that new sheriff was a combination of Thirty Two and Blue Torch, right?
A No, it was not.
Q Okay.
A This was August, sir.
Q Right. And the --
A Whitney was still in the position.
Q Right. And Mr. Niemann, you're recommending to the company, as a strategic alternative, find a friendly source of capital to take Whitney out. Right?
A I wouldn't view these as recommendations. These are simply among the alternatives available to the company. Whitney was being unfriendly, so my suggestion to the company

at the time was you're better off to find somebody that's more friendly.

Q Right. And the new sheriff that's referred to in the bottom line where the dust settles is the person who's more friendly that would come in to the Whitney position, right?

A And/or upsizing it. Yes, sir.

Q Okay. And so, in that case, the -- it's the combination of the Thirty Two loan from Mr. Gonsoulin and the Blue Torch facility that upsized it? Those -- that combination is the new sheriff in town, right?

A That's -- that's not how I thought of this when I wrote that.

Q Okay. All right. Now, you also have, under Liability Management Alternatives -- do you see that?

A I do.

Q All right. And there you have an approach with the noteholders that you call that Papa's New Friends?

A I'm familiar with it.

Q Okay. And the first recommendation is ignore the notes until February 2019. Right?

A I see that.

Q Second alternative is to engage with the notes to calm them down, prepare for standstill upon maturity. Do you see that?

A Yes, I do.

Q And those are steps that you, in fact, that the company, in fact, took on your recommendation, right?
A That is not correct.
Q Okay. Well, let's look at a little bit more detail behind both of them. If you turn with me to Page 40.
A I'm sorry. Page 40?
Q 40. Yeah.
A I'm there.
Q And that's the page that is -- gives more detail on the idea reflected on Page 23 of the strategic alternative of upsizing the revolver, right?
A Yes.
Q And the assumptions and considerations here, the last one, the last bullet on the right-hand column, says, "While upsizing the revolver." Do you see where I'm reading?
A I see it, yes.
Q Okay. "While upsizing the revolver only provides an interim solution, it will provide significant leverage when negotiating with the noteholders." Do you see that?
A Yeah. It's underlined, in fact.
Q Right. And you wanted -- that was important. That's why you underlined it, right?
A I typically underline or bold for emphasis.
Q Okay. So that's something you wanted to emphasize to the company?

A Yeah. I thought it was important.
Q Right. And that's, in fact, what the company did, right? Upsized the revolver, brought in a new friendly source of capital?
A It did that. I'm not sure it provided significant leverage in negotiating with the noteholders, --
Q Okay. Well, --
A -- to be honest with you.
Q -- it did -- the upsizing portion of it happened, as you've said, on the day before the petition date, right?
A That is when it happened, yes.
Q Yeah. So the leverage from that is I guess yet to be seen, right?
A Um, --
Q I'll withdraw --
A I don't think in terms of --
Q I'll withdraw --
A I don't sit around every day thinking about how are we going to get negotiating leverage. This was an observation at the time.
Q Okay. Now, turn forward to Page 42 in that same deck, which is our Committee Exhibit 1. This is the discussion of Papa's New Friends, the liability management alternative, right?
A No.

Q Okay. What is it, if not that? I'm sorry.
A Well, you have to go back. I'm sorry. What page were we on before?
Q 23 was the summary.
A Yeah. There were two columns.
Q Sure.
A One's Papa's New Friends. The other is Papa's New Papas. What we actually did was -- or try to do was column -- the far right, #6. This page, on 42, lays out both of those columns, if you will, in a certain way, and then gets into descriptions, advantages and disadvantages.
Q Okay. I want to focus on the first two lines or the first two sub-bullets there. "The company has three alternatives" -- at the very top -- "in engaging with the noteholders." Do you see that? Do you see where I'm reading?
A I see it, yeah.
Q Okay. "The first is ignore them until the March 2019 maturity." Do you see that?
A Yes, I see that.
Q The second one is, "Keep them warm. Encourage noteholders to organize more formally, engage with their advisor, and allow advisor to review limited due diligence materials." Do you see that?
A I see that.
Q And that's what the company did, isn't it?

A I'm not sure I'd call it limited, but we did encourage and they did get organized. We engaged with -- I'm talking about Houlihan and the company -- engaged with their advisors. You and, I'm sorry, Milbank and PJT. And we allowed you to review due diligence. I wouldn't call it limited.

Q Okay. But the "keep them warm" means you're not actually engaging with the noteholders themselves, right?

A That's not what it means, no.

Q Okay.

A That's not what was intended when I wrote that.

Q All right. But that's, in fact, what happened? We already covered that, right?

A I don't think I testified. No, that is not what happened.

Q Okay. You --

A It's not at all what happened.

Q You didn't engage with the noteholders with any confidential information, correct?

A We provided their advisors -- you, I'm sorry, Milbank --

Q Uh-huh.

A -- and PJT, with material non-public information and material information, not limited.

Q Okay. But you didn't ever restrict the noteholders to engage in discussions directly with them on an MNPI basis, right?

A At least two noteholders, we tried to restrict as far as

the M&A process, unsuccessfully. They chose not to. That would be Q and Oaktree. Don't recall if we asked any others individually. And there was no further -- there was no -- we testi... we went over this. There was no restriction prepetition.
Q And just to be clear, when you say you tried to restrict them as part of the M&A process, not in their capacity as bondholders but as potential purchasers of the company. Is that right? Or certain of the company's assets?
A As -- I'm not sure I understood your question, but I think I can answer it.
Q Sure.
A We attempted to restrict who we understood to be the two largest holders. And I'm going to blank on the time, but it was probably in October or so, maybe November.
When I think of M&A, I think of all alternatives. So one alternative was to get an anchor, if you will, out of the bondholders, one of the larger holders, whether that be Q or Oaktree, to participate in the M&A process. They both chose not to. And I'm sure they had good reasons. I'm not saying there's anything untoward about that. But there was an attempt made and there was no -- there was an NDA I know at least sent to Q. I don't recall if we sent one formally -- Oaktree might have said, don't even bother sending it. I don't recall precisely.

Q Okay.
A But we certainly sent one to Q, and they declined to sign it.
Q Right. But that was in connection with the M&A process, not in connection with a restructuring of the notes?
A The discussion was about an equitization of their debt position as they held it back then, so that, to me, is M&A. M&A includes restructuring.
Q Okay. Okay. The last topic I want to just cover with you, Mr. Niemann, is I understand with respect to -- and let's go back to Tab 35 in the other -- the big binder. I apologize.
A I'll do that. Thank you. And I am there.
Q I'm sorry. Tab 37. I apologize. Which is Exhibit --
A Yes, sir.
Q Debtors' Exhibit 37.
A Got it.
Q This is the calculation of the fee.
A I'm there.
THE COURT: Mr. Leblanc, which exhibit are we in?
MR. LEBLANC: 37, Your Honor. I apologize.
BY MR. LEBLANC:
Q Now, we calculated -- we've talked about the fees. And, again, I don't -- we concluded the number, the math would show $16.7 million theoretically possible. I'm not trying to

restate that testimony. Just trying to orient you. Okay?
A Yes, it's theoretically possible.
Q Okay.
A I'm not sure you and I concluded anything, but yes, --
Q All right.
A -- it's theoretically possible.
Q Now, to the extent that a plan was proposed that would take out the Thirty Two loan facility, then Houlihan would expect to earn an additional fee on that, right?
A If we raised $130 million? Is that your question?
Q Yes.
A We would get the percentages Mr. Califano articulated this morning with respect to that capital, unless the provider of that capital insisted on some other fee and it was a barrier to getting the capital. So, theoretically possible. Yes, sir.
Q Okay. And the -- and so if -- let's just say there's $200 million of secured debt here, right?
A Yes, sir.
Q Okay. And if the -- let me take one half-step backwards. We talked about your valuation, your valuation of $487.5 million. That means you're opining that the future owners of this company are the unsecured creditors of this company, right?
A The plan provides for the equitization of all debt except

Blue Torch.
Q Okay. And the -- under your valuation, the fulcrum security is the unsecured creditor security, right?
A If your definition of fulcrum is where the value runs out, yes, it runs out in the unsecured class.
Q All right. And so if that fulcrum security raised the capital to take out that secured debt, $200 million, then you would earn a fee, even under the revised adjustments? If they did that in equity, that's an $8.4 million fee on top of the other fees that we talked about here. Is that right?
A 4.2 percent times $200 million I think is $8.4 million.
Q And that would be on top of the transaction fee, the monthly fees, any other financing fees, the Blue Torch prepetition fee? On top of all of that, right?
A There are no credits and there are no caps.
Q And even if the fulcrum security raised that capital as a debt facility, that still would earn you a fee of --
A 1.4 --
Q One point --
A -- or 2.1, depending on what that one is.
Q Okay. What kind of debt it is.
A That's right.
Q So let's assume it's unsecured debt. It would be $4.2 million on top of all these fees. And if it's secured debt, it would be $2.8 million on top of all these fees. Is that

right?
A I think that's accurate, if there were no conditions placed on the provision of that capital.
Q And, again, just so we're clear, you're asking for approval under 328, not 330, right?
A That is correct.
Q Okay.
MR. LEBLANC: Your Honor, if I could just have a moment, I think I'm done.
THE COURT: Sure.
(Pause.)
MR. LEBLANC: I have no further questions, Your Honor.
THE COURT: Thank you, Mr. LeBlanc.
THE WITNESS: Thank you.
THE COURT: Does anyone else have any questions of this witness?
MS. KIPPES: No, Your Honor.
THE COURT: Redirect?
MR. HYNES: Yes, Your Honor. May I have five minutes?
THE COURT: Yes. We're going to stop at noon, but you can have five minutes. We'll come back in in five minutes.
MR. HYNES: Thank you.

THE COURT: Mr. Niemann, don't speak with anyone about your testimony. Do you understand that? And that includes the lawyers.

THE WITNESS: Yes, I do, Your Honor. Thank you.

(A recess ensued from 11:29 a.m. until 11:37 a.m.)

THE CLERK: All rise.

THE COURT: Please be seated. Thank you.

(Continued chatter.)

A VOICE: Shh.

A VOICE: Excuse me. Excuse me.

THE COURT: Mr. Niemann, you don't want me to hold you in contempt, do you, back there?

THE WITNESS: I'm sorry, Your Honor.

THE COURT: That's all right.

THE WITNESS: No, sir. That would be a first.

THE COURT: You may proceed.

THE WITNESS: Thank you.

MR. HYNES: Thank you, Your Honor.

REDIRECT EXAMINATION

BY MR. HYNES:

Q Mr. Niemann, you were just asked about your communications with the noteholders. Do you recall those questions?

A I do.

Q And do you recall your communications with the noteholders coming up in the objection filed by the Unsecured Creditors'

Committee?

A I do.

Q Did you endeavor to do any research after reading that objection?

A I did.

Q What did you do?

A I went back through my diary, went back through my electronic communications, which these days are e-mails and texts, and also went back just from my own recollection to try to really decipher what the level of interaction was, what efforts were made with these noteholders and their advisors.

Q Did you memorialize the results of that effort in anything?

A I did.

Q Okay.

MR. HYNES: Your Honor, for demonstrative purposes, I'm providing to the noteholders and to the Court, if it will accept it, a schedule that Mr. Niemann just referred to.

MR. LEBLANC: Your Honor, this is literally the first I'm seeing of it. I don't know that we have -- we're going to deal -- talk about this later in the 1103 issue, about the -- we have 456 documents produced by the Debtors. Zero text messages from Mr. Niemann. Less than 200 e-mails, or around 200 e-mails in total.

I don't know what this is. We have not seen it. No

opportunity to cross-check it. And it's not a proper summary under 1104 because the documents haven't been provided to us, under Federal Rule -- I think it's Federal Rule of Evidence 1104. It's not a proper summary of documents because we don't have them.

MR. HYNES: Well, that might be an objection, Your Honor, if I was offering it into evidence at this time, but I'm not.

MR. LEBLANC: It's -- Your Honor, it's no -- it's not meaningfully -- that's -- a demonstrative is for that purpose.

THE COURT: I'll sustain the objection.

MR. HYNES: Okay.

BY MR. HYNES:

Q Mr. Niemann, do you recall delivering a straw man restructuring proposal to Milbank and PGT [sic] on or about February 22, 2019?

A Yes.

Q Can you describe that?

A It was a --

MR. LEBLANC: Your Honor, I object. The last time we were here, the last time I was here, on the first-days, there was strenuous objection to any mention by me of settlement discussions. He's now describing a prepetition settlement negotiation that they had with the Ad Hoc Committee of Noteholders.

THE COURT: Are you going to go into terms of settlement?

MR. HYNES: I'm happy to avoid the actual terms of the settlement, Your Honor, but this goes directly in response to the unfounded allegation that the Unsecured Creditors' Committee were kept out of the loop and not provided with due diligence for nefarious reasons.

But I will -- I will keep -- stay out of the actual terms of the straw man proposal in response to my adversary's objection.

THE COURT: The objection is then overruled.

MR. HYNES: Thank you, Your Honor.

BY MR. HYNES:

Q Mr. Niemann, do you recall the straw man restructuring proposal that was provided? And I ask that question specifically not asking you to disclose the terms.

A Yeah. It was shared with Mr. Genereux. It was a -- I want to say a seven or eight-page document. It was a very formal term sheet with very formal terms. I won't get into the details of the terms, but it was a comprehensive plan support agreement, what I would call -- we call them straw men, so they can't technically be formal proposals, but it was a very formal, detailed straw man.

Q And did that communication come out of the blue?

A No, sir.

Q Can you explain?
A It was, my way of thinking, my best attempt, with counsel and all the other advisors and management and the restructuring committee and the board, to put on the table that which I thought might resonate with the noteholders based on my several months of interaction with at least two of the noteholders and their counsel and their advisor.
Q Are you familiar with the term blowout?
A Yes, sir.
Q And what does that mean?
A The way I think of it, and I'm sure I'm taking some liberties, but is that when you share material nonpublic information -- in this case, with the noteholders, let's say -- at some point they are able to, quote, blow it out into the market, so you put it out in the public domain, typically through an 8-K of some sort, some sort of SEC reporting, so that that information is now in the public domain, it is no longer nonpublic.
Q And to your knowledge, did the company have blowout concerns in connection with the straw man restructuring proposal that was provided?
A Yes.
Q Can you explain those concerns?
A Frankly, it's the very concerns we raised at the first day, and in some respects I think what Mr. LeBlanc is getting

at, is we -- we don't want bid-ask floating around in the market. We want to be able to negotiate and know that, you know, there's not going to be a public blowout of, for instance, that straw man or the analytics that go into that straw man or the business plan or the things that would go into underwriting that straw man.

So, that's sacred information that we want to keep as nonpublic as possible for as long as possible. Typically.

Q And in your experience, is it -- does whether the parties are close to a deal influence the blowout concern?

A It always does.

Q And what was the case here?

A The best way I could --

Q Without -- without disclosing any --

A No, no, I wasn't going to. I use a football field analogy, Your Honor. So, say 40-to-40. Then I'm comfortable we're in the -- it's not really the red zone. I think that's the 20-yard-line. But 40-to-40. And I think I actually said this to the board. I believed we were at or around the 40, maybe we're at the 38, to be candid. And the response we got from Mr. Genereux, which was an oral response, if that's the right way to say it -- it wasn't a written response; it was a phone call that described what they might be willing to do -- I viewed as kind of down on their 20-yard-line. So we never got to the point where I could tell the board and the company,

you know what, I'm comfortable we're within striking distance, or at least getting into a position of 40-to-40, 35-to-35. We never got to that point. And so it was a concern to share information subject to blowout when the likelihood of a deal was low.
Q Do you recall how close to the filing date it was when Mr. Genereux responded orally?
A I want to say maybe two weeks. I don't remember the exact date.
Q And did that influence the company's ability to share information with the Unsecured Creditors' Committee?
A It was the Ad Hoc Committee, Group, I guess, at the time, formally. How should I answer that? We weren't concerned about Mr. Genereux -- he's a, again, he's a capable guy; his team is capable -- sharing that information. You kind of have to thread the needle on this stuff, share what you can, guide as much as you can.
But we were concerned giving material nonpublic information that we would not want blown out into the market if we never got to a deal. And so there was, if I recall correctly, a fair amount of discussion around whether or not we should restrict, and if so, on what terms. It's always a heavily-negotiated point.
Q Thank you.
MR. HYNES: Your Honor, I'd like to go to Exhibit 1

that my adversary marked at Page 23.

BY MR. HYNES:

Q Could you please pull that page out of the binder?

A Of the -- of Mr. LeBlanc's binder?

Q Exactly.

A I've got it. I just didn't know which binder. I prefer to call him Mr. LeBlanc as opposed to an adversary.

Q Old habit. We -- we actually haven't met. At Page 23, do you recall the questions you were asked on the overview of strategic alternatives?

A I do, sir.

Q Okay. What's the first one called again?

A On Page 23? Let me get there. Papa's Crown Jewels?

Q Yes, sir. Can you explain that potential strategic alternative?

A Yeah. Yes, sir. Again, this was August, and so we didn't have the level of information we had in September, October, November. As we go deeper, we get more information, kind of going from 50,000 to 40,000. We were probably at 35,000 feet. But I like to get down to maybe 20,000 or 15,000 feet. So we're far -- a long way from that. But we certainly viewed Air Medical as not subject to the same volatility and trough that we're in vis-à-vis Oil & Gas. Air Medical has got its own challenges, mind you, and it's a complicated business in its own right. But from the outside looking in at this point,

back in August, we thought that that's an attractive asset that certain -- certainly, strategic investors -- *i.e.*, other air medical operators -- would have a high degree of interest in.

I also believe -- this is just a view, one man's view -- that but for Air Medical, we might have had to explore restructuring of PHI a long time ago. Just like CHC, just like Erickson, just like Waypoint. So it's provided a hedge. So Papa's Crown Jewel was, if we can't get anybody interested in the whole thing, maybe we can sell Air Medical and pay off the bonds. Maybe we can sell it for $500 million plus. Even if we can get to $500 million, maybe we could sell it for enough with maybe some upsizing that we can actually pay off the bonds and not have to worry about the maturity. That -- and I don't -- I could go through the bullets, but that was my thought process when I wrote this.

Q Do you know whether Houlihan Lokey or the company pursued that strategic alternative?

A Yes. Aggressively.

Q And what became of it?

A We -- and I'm going to be a little careful with how I say this. It's in the valuation report. I shared this with the Equity Committee yesterday. Happy to share it in detail with the Creditors' Committee. We got more than one preliminary indication of interest -- I'm not saying whether it was two or

ten, but you should assume it's closer to one than ten -- from two, two or more strategics, and they were preliminary indications of interest for the Air Medical assets. We did not get any indications of interest for the total company or for Oil & Gas.

Q Thank you. So you pursued Strategic Alternative 1 with the company, correct?

A Yes. Aggressively.

Q What's #2 here?

A Papa's New Partner is a merger of the entire enterprise, Oil & Gas and Air Medical, with another strategic. And, in fact, we identify -- it's all public. People know who these people are. Air Methods and AMGH are air medical operators. They're owned -- they're sponsor-backed, if you will. I believe American Securities and KKR are the two, respectively, the sponsors. I believe Air Methods at one time was public. CHC, Babcock, CD&R, et cetera. Those are all the O&G strategics. CHC being obvious. Babcock perhaps a little less obvious. It's a helicopter operation within a much bigger conglomerate that they acquired. CD&R is an equity sponsor that has clearly displayed interest in this sector by virtue of the fact that they were the CHC sponsor and they, for lack of a better description, fought hard to hold onto their equity position against what were then my clients, which were led by Bain, Alliance Bernstein, and others, who are now the majority

equity holders of CHC.

So, go talk to those guys about maybe a total company deal that either pays off the bonds or we have something to talk to the bonds about. I'm sorry. Notes. These are notes, not bonds.

Q Were any actions taken to explore Strategic Alternative #2?

A Yes. We aggressively explored it.

Q What is Strategic Alternative #3?

A And by the way, if I may, within that is what I was talking about earlier, per Mr. Leblanc's questioning. We did talk to others than are on this page, including, without limitation, QNO, Prius, Potential, sort of new sponsors, given their current debt position in Papa, in PHI, and our understanding of their debt position in other strategics, if you will. I'll just leave it at that.

Papa's New Shoes. 3. Just go refinance the existing debt. Existing debt being the existing notes.

Q Did Houlihan or the company explore the possibility of Strategic Alternative 3?

A The company did.

Q And what was the outcome?

A There was a failed refinancing effort led by UBS, and I think the co- or maybe, say, lead left, whatever it was. But Royal Bank of Canada was a co-advisor in that, and it was a

failed refinancing effort to provide a secured loan to the existing noteholders, effectively. Don't know if Q was an existing noteholder at the time. I think this failure -- or this, I'm sorry, I shouldn't -- this attempt was July into August, if I'm not mistaken. Don't know exactly when the roadshow was. And then there was an exchange offer that sat out there for a while and was ultimately abandoned. I think in September, if I'm not mistaken.

So basically it would be the existing noteholders getting a secured loan in lieu of their unsecured loan, and the pricing and the terms got to a point that the secured noteholders, as I understand, were demanding, market demands, that it would effectively not be supportable by the company. They dodged that bullet only to walk into another bullet, you know, nine, twelve months later.

Q So is it fair to say the company pursued all those market-based alternatives?

A Yes. We were only involved in the first two.

Q Mr. Niemann, --

A We, Houlihan. I'm sorry.

Q You --

MR. HYNES: I'm mindful of the time, Your Honor.

BY MR. HYNES:

Q Mr. Niemann, you were asked about the leases on your cross-examination.

A Yes, sir.

Q Do you recall that?

A I do.

Q Are the leases part of the Debtors' capital structure that needs to be renegotiated?

A Yes.

Q Are you involved in the renegotiation, or your team?

A We are.

Q And can you tell me what that entails?

A The way I describe these restructurings, these helicopter restructurings, is they're multiple restructurings. So we're restructuring a lease portfolio. Frankly, Seabury, given their competencies, handled that to a degree in CHC, then we kind of jumped in because we were the new sponsor. But you've got to -- to really underwrite new money into these deals, you've got to know what the run rate EBITDA is. To know what the run rate EBITDA is, or, you know, what kind of costs can Mr. Bospflug and his team take out of this company, what kind of costs can he take out of this company includes, without limitation, if we can get concessions out of these lessors and we have, let's say, I don't know, $10 million a year in lease costs now, but thanks to the Bankruptcy Code and negotiating against that and what's happened in other cases, *CHC* in particular, and there's other large operators out there that are not doing so well, so maybe, just maybe, you can get

lessors to be a part of the going-forward fleet on more market terms. Because all of these leases, spare perhaps the HN Zed, are arguably well above market. So if we could cut that ten -- and I'm not saying it's $10 million. I'm just giving a hypothetical. If we can cut that $10 million down to $5 million and then apply a multiple to that, that's enterprise value. So that unto itself is its own restructuring, above and beyond the notes and all the other stuff you've got to do.

Q And how -- remind me how long you've been working with PHI.

A I mean, I've -- I've known Lance and then Mr. Gonsoulin -- Lance Bospflug -- for three-plus years. Our work in earnest started in, I guess, August into September. It feels like we've been working for five years in that period of time. So, you know, certainly since September.

MR. HYNES: One minute, Your Honor?

THE COURT: Sure.

(Pause.)

MR. HYNES: No further questions, Your Honor.

THE COURT: Thank you. Mr. Leblanc, are you going to have questions of the witness?

MR. LEBLANC: I'm sorry, Your Honor? I didn't hear.

THE COURT: Are you going to have more questions of the witness?

MR. LEBLANC: Just a -- I'll be done by 12:00.

THE COURT: Sure.

THE WITNESS: Thank you.

THE COURT: Good.

RECROSS-EXAMINATION

BY MR. LEBLANC:

Q Mr. Niemann, you were asked some questions on redirect about a proposal from late February. Do you recall that, those questions?

A The straw man, you mean?

Q Yes.

A Yes, sir.

Q And there's no dispute, we couldn't share that straw man proposal with our clients, right? The noteholders in that case, in that instance?

A I shared aspects of it with them. So you couldn't share the document, but you could certainly share aspects. They were the aspects of that that are nonmaterial nonpublic information, and I shared it directly with at least two of the noteholders.

Q Okay. But if the information that was -- if the information was material and it was nonpublic, then we couldn't share it? So we could only share if it was public or if it was immaterial, correct?

A If it didn't meet the material nonpublic information standard, --

Q Right.
A -- then it shouldn't be shared.
Q And in response to a question just a minute ago about the leases, I didn't get -- you were talking pretty fast so I didn't get all of it, but I think you said to really invest new money you need the run rate EBITDA. Do you recall that? Just --
A That is generally the case.
Q Okay. And at the time you made that proposal, you had not provided a business plan to the noteholders, correct? The straw man proposal, right?
A I don't know if that's the case. I know we had provided a high -- Mr. Del Genio provided a high-level business plan two days after we met with the noteholders, all the noteholders, in person, in Houston. They didn't want to come to Lafayette. Mr. Gonsoulin, Mr. Brass, Mr. Bospflug, the entire management team, advisors. Sam was there from your shop. PJT. Certainly, Mr. Singh was there. And then two days later we provided a high-level, what I call an executive level, Mr. Del Genio provided. And then I want to say a week or so later we provided the detail.

I don't recall if that was before or after the straw man. It was sometime around the same time.
Q All right. But, again, with respect to that, that was not public information, correct?

A Again, not everything that's in a business plan is material. And so, for instance, if I was your advisor, --
Q Okay. I mean, --
A -- I would look at it and I would say, some of this we can share, some of it we can't. You've got to thread the needle on this. So I can't answer your question that way.
MR. LEBLANC: Move to strike, Your Honor.
THE COURT: Sustained.
BY MR. LEBLANC:
Q The first meeting that the company has had with any unsecured creditors -- meaning, not with their advisors but with unsecured creditors -- to go over a business plan happened last Thursday. Is that right?
A There was -- you know, I disagree with that. The discussions Mr. Gonsoulin had with the senior executives at Q, the discussions Mr. Gonsoulin had with senior executives at Oaktree, while somewhat social, there was discussion around prospects for the industry -- sector, I should call it -- and then we presented information during that first meeting as far as -- and they asked a lot of good questions. In particular, I remember, well, both Mr. McCarty from Q, what's his -- Jonathan Sacks, I think it was, from Stonehill asked a lot of good questions around prospects for the business.
So, you know, that was a business plan discussion. It wasn't MNPI, but it was a discussion around the planning on

the business.

As far as formal business plan, it was what Mr. Del Genio provided in two increments.

Q And those two increments prepetition were not provided to the creditors themselves?

A I can't tell you what PJT and you provided to your clients. I would have expected that some part of it that's not MNPI would have been provided, but that's --

Q But only --

A That's just how -- I don't know what you guys did.

Q Only a confidential version of that was provided to us, right? One that was not -- we weren't able to disseminate to creditors, right?

A All I can tell you is, if I got that, I would not share the document but I would actually share that which is not MNPI to educate as much as possible to try to narrow the 40-to-40. That's what I would have done.

Q Postpetition -- let me see if you'll agree with this, at least. Postpetition, the only -- the first time the company shared a projection of its go-forward EBITDA in a business plan with creditors was on Thursday of last week. Is that fair?

A I don't know if we shared it with lessors that are under confidentiality. And we shared it with Blue Torch, who's under confidentiality. And obviously, Thirty Two. So that's

not correct. We shared it with certain creditors. If you're talking about --
Q I said unsecured --
A -- your clients, --
Q I said unsecured creditors, but let's limit it to -- that's fine. You met with our clients --
A Well, lessors are unsecured.
Q You met with our clients; last week was the first time we had a business plan meeting. Is that right?
A First time we could get you in a room, yes.
Q You -- is it your testimony, Mr. Niemann, that we were the ones that asked for -- to delay a business plan meeting until last Thursday, that we wouldn't meet -- our clients wouldn't meet earlier on a business plan?
A My testimony is we have made multiple attempts to get your clients in a room and we have been rebuffed.
Q And on a business -- you're saying that it was our clients who pushed a business plan meeting until last Thursday?
A I --
Q Or did our clients ask for a business plan meeting earlier than that and it couldn't happen from the Debtors?
A I don't know who asked for what. I know Mr. Del Genio and Mr. Bospflug hosted a management presentation for the Creditors' Committee last Thursday. That's all I know.
Q Okay. All right.

A I don't know who asked for what or all that stuff.
Q Okay. So that's all you know, is there was a meeting last Thursday?
A Well, I mean, I heard it went well, but, I mean, --
Q Okay.

MR. LEBLANC: I have no further questions, Your Honor.

THE COURT: Thank you.

MR. LEBLANC: I apologize. 12:02.

THE COURT: That's okay. Does anyone else have any questions of Mr. Niemann? You may step down, sir. Thank you.

THE WITNESS: Thank you, sir.

(The witness steps down.)

THE COURT: Can the Debtor preview me on you have another witness from the Debtors' side; is that right?

MR. CALIFANO: Yes, Your Honor. That would be Mr. Bospflug.

THE COURT: All right. And then the Committee has a witness, or more?

MR. LEBLANC: Just, we have a witness live. There's a page of Mr. Del Genio's deposition that we can either call him to admit or just read it to the Court. We're fine doing it as efficiently as we can.

THE COURT: All right. We'll be in recess until 1:30. You can leave your stuff where it is. This is all we

have going today. That's an understatement, I think. And I think you all will be visiting over the lunch hour about some of the matters that we talked about at the beginning; is that right?

MR. CALIFANO: Yes, Your Honor.

MR. HYNES: Yes.

MR. CALIFANO: We talked about the mediation.

THE COURT: Okay. And anything on KEIP that is --

MR. CALIFANO: I think that -- I believe that -- that's one of the things I was running out with Mr. Simon. I think that we're done on that.

MR. SIMON: I think we have a deal as well.

MR. CALIFANO: I think we have a deal, so we've just got to --

MR. LEBLANC: To be clear, I think the U.S. Trustee still has reservations, but --

MR. CALIFANO: We have a deal.

MR. LEBLANC: Yeah.

THE COURT: Okay. Well, if you all would visit with the U.S. Trustee over the lunch hour on KEIP also.

MS. KIPPES: Your Honor, I have asked them to put on evidence that it is an incentive plan versus a retention plan. That's their burden anyway under the statute.

THE COURT: Uh-huh.

MS. KIPPES: And I believe Mr. Del Genio has agreed

either to testify or maybe there will be a proffer.

THE COURT: Okay. Thank you.

MS. KIPPES: Thank you.

THE COURT: Mr. Simon, were you going to add to that? Were you going to add to that, Mr. Simon?

MR. SIMON: I was just going to confirm that. We'll be prepared either at the -- at 1:30 or sometime thereafter --

THE COURT: Uh-huh.

MR. SIMON: -- to read the settlement into the record and put a proffer of Mr. Del Genio on.

THE COURT: We're right in the middle of Houlihan. It does not matter to me if you all want to stop that and go into KEIP first. It doesn't matter. Whatever you all think is the most efficient way of handling that, that's fine. All right. But I do think if you talk about mediation, it will also --

MR. CALIFANO: We will, Your Honor.

THE COURT: -- dovetail some into the adjournment motion.

MR. CALIFANO: We will.

MR. SIMON: Yes.

THE COURT: All right. We'll be in recess.

(A luncheon recess ensued from 12:04 p.m. until 1:31 p.m.)

THE COURT: Please be seated, you all. Thank you.

MR. CALIFANO: Your Honor, if I may?

THE COURT: Sure.

MR. CALIFANO: I just wanted to say this at the outset, because, you know, I know we have time constraints today: Happily, we have an agreement on mediation going forward that will move the -- and at the end of the hearing, we'll give you the details -- but that means the 1103 motion is now off. And we have a deal on the KEIP, and I would just suggest that we save ten minutes or so at the end. Mr. Simon will read the KEIP into the record and then put the proffer on that the U.S. Trustee has asked for.

THE COURT: All right. Mr. Levick, did you need to --

MR. LEVICK: Yes, Your Honor. And Your Honor, I represent Cynthia [sic] Wray, a putative class action plaintiff. And I had some comments about the mediation motion. Would you like me to speak now, --

THE COURT: I think when --

MR. LEVICK: -- or speak later?

THE COURT: When we get to it, I think.

MR. LEVICK: Okay. Thank you, Your Honor.

THE COURT: Yes. Is there a lawyer for Debtor and Committee that might speak with Mr. Levick while we're going on the Houlihan?

MR. CALIFANO: Sure.

THE COURT: Or have you all already spoken?

MR. LEVICK: I have spoken to Debtors' counsel --

THE COURT: Oh, you have? Okay.

MR. LEVICK: -- and didn't quite get my way, so I wanted to speak to the Court.

THE COURT: Oh, okay.

MR. LEVICK: Thank you.

MS. KIPPES: And Your Honor, just to be clear on the KERP/KEIP motion, the U.S. Trustee may have cross after the proffer. We're going to hear what the proffer says first.

THE COURT: That's fine.

MS. KIPPES: Thank you.

THE COURT: All right. So, did I understand we just keep going with the Houlihan motion?

MR. CALIFANO: Yes. Yes, Your Honor.

THE COURT: All right.

MR. HYNES: Yes, Your Honor.

THE COURT: All right. You may call your next witness.

MR. HYNES: Your Honor, the Debtor calls Lance Bospflug.

THE COURT: Please raise your right hand.

LANCE BOSPFLUG, DEBTORS' WITNESS, SWORN

THE COURT: You may be seated.

MR. HYNES: Thank you, Your Honor.

DIRECT EXAMINATION

BY MR. HYNES:
Q Mr. Bospflug, would you mind taking the binder that's behind you out? All of the exhibits that we will be showing you will be marked 30 and below. That will be the first binder.
A I've got Volume I, Volume II, Chapter 11.
A VOICE: This volume right here.
THE WITNESS: Okay.
MR. HYNES: Thank you.
BY MR. HYNES:
Q Would you mind re-introducing yourself to the Court, sir?
A Yes. My name is Lance Frank Bospflug.
Q And can you remind the Court of your position with the company and how long you've been part of it?
A I'm president and chief operating officer, and I've been with the company since late 2000.
Q And do you serve on the Board of Directors?
A I do.
Q How long have you served on the board?
A Since 2001.
Q Are you familiar with Houlihan Lokey?
A Yes, I am.
Q And who are they?
A Investment banker, advisor, that we retained.
Q Are you familiar with Matt Niemann?

A Yes, I am.
Q He just testified, right?
A Yes.
Q When did you first become introduced to Houlihan Lokey?
A I met -- was introduced to Mr. Niemann in late 2016 by a mutual acquaintance from Sikorsky that is now with Houlihan.
Q And what was your impression of Houlihan Lokey at the time, if any?
A Well, initially, I didn't know them, and subsequent to late in the year we started talking. And the first thing was that they produced a -- one of the most extensive reviews of the rotorcraft industry that I've ever seen. So that impressed me right away. We get pitched a lot, and not too many people really understand our industry, but they did.
Q And did you have any impression of Mr. Niemann at that time?
A I did.
Q And what was it?
A Smart. Aggressive. Very knowledgeable. Experienced in our industry, representing -- or, involved with CHC, Waypoint, and Erickson.
Q So, back then, you didn't retain Houlihan at that point in time, did you?
A No, we didn't.
Q When was the next time you had a chance to interact with

Houlihan and Mr. Niemann?

A It was --

MR. LEBLANC: Your Honor?

THE WITNESS: It was the following year, at HAI.

THE COURT: Hold on a just a second.

MR. LEBLANC: Your Honor, this gets back to the motion in limine. I've gone through and I took the opportunity at the lunch break to go back again through the Debtors' motion, and there's nothing that would put us on notice of any Debtor witness intending to testify. There's not -- you -- they can't tie -- and I'm fine with these background questions, but we're already at an area that is well beyond what's in their motion. And if that was the basis upon which Mr. Bospflug could testify today, we're already outside that.

And I just worry where we're going now. Because I've read it again. It's as sparse a motion as you can see. It doesn't even mention anything about the board, the company, anything that would be relevant, that would tie to these line -- this line of questioning.

THE COURT: Do you want to respond to that?

MR. HYNES: It doesn't sound like there's an objection, Your Honor.

THE COURT: Do you --

MR. HYNES: It sounds like he's threatening to make

an objection.

THE COURT: Do you --

MR. LEBLANC: I object, Your Honor.

THE COURT: Do you want to respond to his comments?

MR. HYNES: Yes, Your Honor. The motion was to appoint the investment banking firm by the Debtor. Mr. Bospflug is here on behalf of the company to explain the engagement and the execution of the letter. All we're talking about is background here, Your Honor.

THE COURT: Well, okay. I think you ought to move along into the motion, then, all right?

MR. HYNES: Okay. Thank you, Your Honor.

BY MR. HYNES:

Q Could you turn to Exhibit 29, Mr. Bospflug? Do you recognize that document?

A Yes, I do.

Q And what is it?

A Well, it's the -- it's the application to retain Houlihan.

Q Okay. And can you look at Exhibit 30 as well?

A This is Mr. Niemann's declaration.

Q Uh-huh. And does Mr. Niemann's declaration also include a copy of the engagement letter? I'll give you a hint. Look at Page 10 of 40.

A Yes, it does.

Q Okay. Is that the engagement letter that the company

entered with Houlihan Lokey?
A Yes, it is.
Q Okay. Were you involved in the negotiation of that letter?
A Yes, I was.
Q Okay. Can you tell me about the negotiation?
MR. LEBLANC: Objection, Your Honor. There's nothing in the motion that talks about any of the negotiation of this. We deposed Mr. Del Genio, the signatory to the motion. We deposed Mr. Niemann, the declarant on the motion. And we didn't -- we got no information about the negotiation of it. Had we known -- and, again, when we were told that Mr. Bospflug would testify, we asked for his deposition. We weren't granted it.
THE COURT: Overruled.
BY MR. HYNES:
Q You can answer the question, or would you like me to repeat it?
A Would you repeat it, please?
Q Sure. Can -- what do you recall about the negotiation of the engagement letter at issue here today with Houlihan Lokey?
A So, it was -- it was really three of us that negotiated this. It was myself, Trudy McConnaughhay, our chief financial officer, and Al Gonsoulin, our CEO. And we also had the advice of our local counsel, Jones Walker.

Q And did the board ultimately approve this engagement letter?
A Yes, they did.
Q Do you believe, as you sit here -- well, strike that. Did you hear Mr. Niemann's testimony earlier today?
A I did.
Q Did you hear the cross-examination that was delivered?
A I did.
Q Did you hear the statement from Mr. Califano about the discounts Houlihan Lokey is offering?
A Yes, I did.
Q And as you sit here today, do you believe that the retention of Houlihan Lokey is in the best interests of the company?
A Yes, I do.
Q Why?
A Well, not only were they the most knowledgeable about our industry, but they stepped in at first and did a lot of heavy lifting in terms of financial analysis, presented us with alternatives. Then we moved to the M&A process, and we ran through the complete M&A process. I felt that we had good exposure on that and that we drove it all the way to the end of 2018, looking for a way to monetize part of the company in order to take care of the bonds. It didn't work out. And then we shifted into the restructuring discussions .

MR. HYNES: I'll pass the witness, Your Honor.

THE COURT: Mr. Leblanc?

MR. LEBLANC: Your Honor, I have no questions.

THE COURT: You may step down, sir. Thank you.

THE WITNESS: Thank you, Your Honor.

(The witness steps down.)

THE COURT: Does the Debtor have any more witnesses?

MR. HYNES: No further witnesses on this motion, Your Honor.

THE COURT: All right. The case switches over to you, Mr. Leblanc.

MR. LEBLANC: All right. Yes, Your Honor.

MR. HYNES: Sorry. Sorry, Your Honor. Mr. Califano wanted to make sure that I reminded the Court that I reserved some rebuttal time at the end.

THE COURT: Yes.

MR. HYNES: Thank you, Your Honor.

MR. LEBLANC: Your Honor, we have two witnesses, one of which will be by designation. We've talked to the Debtors. And what I propose, Your Honor, it's just a page: Rather than put somebody up there, I'll just read it to the Court.

THE COURT: That's fine.

MR. LEBLANC: It's literally a page of the --

THE COURT: If it's a page, you can just read it into the record.

MR. LEBLANC: Yeah. And I'll -- so, and just to gives you a preview of our case, this will be Mr. Del Genio's testimony by double designation, and then my partner, Mr. Stone, will present Martin Lewis to the Court as a --

THE COURT: All right.

MR. LEBLANC: -- as an expert. And Your Honor, this comes from the deposition of Robert Del Genio taken on April 10, 2019. Page 75, Line 14. And I appreciate Your Honor doesn't have it, but I'll just read the question and answer into the record.

"Q Do you know who signed the engagement letter for PHI engaging Houlihan?

"A No.

"Q Was there a -- you did sign the application to employ Houlihan, right? That was filed with the Court.

"A As part of the first-day?

"Q Yes.

"A Yes. I signed. I signed almost everything for the first-day, yes. So I do, I do remember signing that as part of the first-day motions, yes.

"Q Did you, as the chief restructuring officer, exercise your business judgment in determining to employ Houlihan postpetition?

"A Well, within my scope, I don't have the authority, but I was supportive of their retention.

"Q Did you review the terms upon which they were retained?

"A I was -- I saw their engagement letter, but that wasn't my responsibility to negotiate the economics of that. That was done with the company and the board.

"Q Okay. Did you ever look at the economics that were contained in their engagement letter?

"A There's a -- there is lots of permutations, like in every other investment banker's engagement letter. Sometimes I think you need a PhD to figure that out, those out. I was sure -- I was more focused on, to be honest with you, the cash flow forecast and business plan and getting the company ready for Chapter 11."

MR. LEBLANC: That ends the designation, Your Honor.

THE COURT: Thank you.

MR. LEBLANC: And with that, Your Honor, I'll cede the podium to Mr. Stone.

THE COURT: And let me ask you. Do you have a hard copy of that, too, that I can have?

MR. LEBLANC: I will get you one --

THE COURT: You can --

MR. LEBLANC: -- that doesn't have notes on it, Your Honor, --

THE COURT: That's fine. Yes.

MR. LEBLANC: -- in just a moment.

THE COURT: That's fine. Mr. Stone, you may call your witness.

MR. STONE: Good afternoon, Your Honor. The Committee calls Martin Lewis.

THE COURT: Mr. Lewis? Would you raise your right hand?

MARTIN LEWIS, UNSECURED CREDITORS' COMMITTEE'S WITNESS, SWORN

THE COURT: You may be seated.

DIRECT EXAMINATION

BY MR. STONE:

Q Mr. Lewis, could you introduce yourself to the Court, please?

A Yes. My name is Martin Lewis.

Q What do you do for a living?

A I have my own company called Gower Advisors, which is an advisory firm that is involved in both restructuring advice and investment -- analyzing investment opportunities.

Q Would you tell the Court about your educational background?

A Yes. I have a master's degree from Oxford University in the United Kingdom and I trained and qualified as a chartered accountant in the U.K. with Coopers & Lybrand .

Q And if you could step through your employment history after becoming a chartered accountant.

A My first banking role was at the Rothschild Bank in

London, and then I came to the United States in 1986 with Chemical Bank, primarily involved in capital markets and financing activities. I joined Chemical Bank's restructuring and reorganization business under a gentleman called Art Newman in 1989. We moved as a group to Blackstone in 1991, and we were the founding members of Blackstone's restructuring business in 1991. I was a managing director there, and then I became a partner at Wasserstein Perella in their restructuring/investment banking business in 1998. And I was a founding member, a founding partner of the firm that spun out of Wasserstein Perella that was called then Miller Buckfire Lewis, which is now known as Miller Buckfire. And through that time, my primary activity was as an investment banker managing and running large complex bankruptcy cases and out-of-court cases.

I then spent some time in 2004, '5, and '6 working with a private equity firm in an attempt to set up a merchant banking business, which didn't work out. Then I came back into the restructuring advisory business in 2007 when I became a managing director of Greenhill in New York, and I spent seven years with them as a managing director, again, involved primarily in investment banking advisory business for mostly companies.

And since 2013, when I left Greenhill, I have had my own firm, Gower, in which I split my time between assisting a

family fund in New York looking for investment opportunities in the middle market and providing advice in the restructuring world, slightly different from the type I used to do in investment banking but more strategic, high-level advisory business.

Q Now, through the course of your career, starting when you were at Chemical Bank, did you have occasion to be involved in the negotiation of engagement letters for your firm as an investment banker?

A Yes, I did.

Q Tell me about that. What is your experience in negotiating engagement letters?

A Pretty much in every case since I became a senior member of teams, which would have been in Blackstone in the mid-'90s, from that point my role is primarily running cases, advisory cases, and I would have been the person responsible for negotiating those engagement letters on behalf of the company I was working for. And so I was intimately involved in the engagement letter process throughout the whole of my career when I was with large investment banks.

Q And when is the last time that you can recall being involved in the negotiation of an engagement letter?

A So, the last -- specifically, the last engagement letter I was involved with for a company that was -- for the company side involved in a restructuring was for NCI in 2010.

Q Okay. And have you negotiated any engagement letters since then?

A I have negotiated various engagement letters connected with restructurings for myself as -- on behalf of creditors and other potential interested parties. I have not negotiated a debtor-side engagement letter --

Q And --

A -- since then.

Q -- what other things, if any, have you done to stay abreast of the market for fees for investment bankers in the restructuring area?

A I was involved in, this last December and January, in a situation where I was asked to review a set of engagement letters for debtor advisors in a case called *David's Bridal* in Delaware on behalf of a lender group. And in that process, I provided something similar in the declaration and analysis I did here, which was a review of about 25 debtor-side cases, 2017 and 2018, a review of all the aspects of those engagement letters, with the same analysis, which was to understand whether they appeared -- whether the objection that was being raised about somebody's engagement letter was reasonable in light of the market of engagement letters.

Q In the *David's Bridal* matter, did you end up testifying?

A I didn't actually get up on the stand in the end. It was settled in the courtroom minutes before I was asked to the

stand.

Q Okay. Did you ever, on any other occasion, testify about investment banker fees?

A I did testify once in a case called *Fleetwood Industries*, in which I was the investment banker, where there was an objection to our fees in that case. That was in California. And I testified on the reasonableness of our fee, engagement letter, then.

Q Okay.

A That was 2009.

Q So, in either of the *David's Bridal* case and the *Fleetwood* case, were you formally offered as an expert on fees?

A I am not sure of the answer to that. I know I gave testimony in *Fleetwood* on the stand. My recollection was that I thought I might have been accepted as an expert, but it might have been just as a -- as a witness for my engagement letter. And again, on *David's Bridal*, I had thought I might -- I was going to be put on the stand as an expert on those things, and then I didn't get up on the stand in the end. And so I don't know really the answer technically to that question.

Q Okay. What were you asked to do in this matter?

A I was asked to do a similar review of reviewing the Houlihan engagement and give an opinion as to whether I thought that the overall terms of that engagement were

reasonable in light of the size and complexity of the case involved.

Q And what did you do to come to that opinion?

A I -- as I mentioned, I had already prepared an analysis for the *David's Bridal* case that had a number of company cases, about 20 of them, and I was provided with a schedule that had been developed by Houlihan Lokey that I think was presented earlier that reflected cases in 2015 and 2016. And so I took all of those cases and I took the cases I had reviewed in '17 and '18 and I reviewed all the details of the engagement letter, from the actual engagement letter through the application, the final order, and then the final fee applications for all those engagement letters.

Q Okay. Did you add or subtract any companies from the list of comparables that you received from the Houlihan document that you saw?

A Yes, I did.

Q What did you do?

A Well, there -- as I said, I had prepared something for this other situation which included some companies in the $400 to $800 million debt range that weren't on the Houlihan list, and I had about six of them, I think, that were -- that fit the same parameters, which was companies that filed in 2017 and 2018 that had prepetition debt somewhere in the $300 to $800 million range. So I added the ones that I had that

weren't on the Houlihan schedule, I added those to our schedule.

Q And did you take any off?

A I took the one off that was unidentified, I think it was called Unidentified Company, because I couldn't verify what it was. It had no indication of what the company was. It wasn't public. And I -- there was a duplication of one of the entries. And then I made some adjustments to some of the entries on the debt side in particular that was on the Houlihan schedule, just to make sure that all the numbers were consistently treated.

MR. STONE: Your Honor, at this time I would like to offer Mr. Lewis as an expert in financial advisor's fees in restructuring matters.

MR. CALIFANO: Your Honor, I object. I don't see how this witness has anything -- any specialized knowledge that fits within Rule 702. There's -- all he's said is that he's gotten publicly-available documents and ran them through some sort of grid. 702 says clearly an expert qualified by knowledge, skill, experience, training, or education, and I don't see how any of that relates to professional fees.

THE COURT: That objection --

MR. CALIFANO: May I *voir dire*?

THE COURT: That objection is overruled. Goes to the weight to give the witness' testimony. He may testify as an

expert.

MR. STONE: Thank you, Your Honor.

BY MR. STONE:

Q Mr. Lewis, if you would turn to Debtors' Exhibit 33, which is in one of those big notebooks behind you.

A Oh. Is it Volume I or Volume --

Q Should be Volume I, I think.

A Volume I? I'm sorry. Say again. Thirty -- what number?

Q Thirty-three.

A Thirty-three? Yes, I have it.

Q Do you recognize that document?

A Yes, I do.

Q And what is that document?

A This is my declaration, including the analysis that I developed in support of the objection.

Q Okay. And is that your signature on Page 11? Did you execute the document?

A Just check that it was. Yes. Yes, I did.

Q And do you continue to believe that everything in this declaration is true?

A Yes, I do.

Q Okay. Could you describe for the Court generally how investment bankers are compensated in restructuring matters?

A Yeah. It's been a pretty standard arrangement for investment bankers since probably the mid-'90s, I think, of

the engagement letter being a combination of a monthly fee that might change in different ways, but it's usually a fixed monthly fee.

There's usually a restructuring or transaction fee at the completion of the case. There is usually a sale fee if either the company is sold in full or if there are assets of the company sold in 363 sales. There are usually a set of financing fees that relate to raising money. And they're -- and those are usually identified as percentage fees relating to different types of financings.

There is usually a monthly credit involved, at least in the monthly -- the monthly fees set off against the restructuring fee, and that can take the form of a number of different ways of doing it. There is very frequently a crediting of some of the financing fees against restructuring fees.

There's usually -- it's pretty normal to have, as I think Mr. Niemann has testified, the sale or the restructuring fee being either one or the other. Usually banks don't take both a transaction fee and a sale fee if it's for the whole company.

There's often involved in these terms reduced fees if the money in the financing section is provided by creditors already involved in the case.

And then, in the technical side, there's always been --

328 has always been a part of the engagement letters that certainly I have experienced over my time as an investment banker, that's a normal part of the request, as is the indemnification request that is always part of the -- always part of the engagement.

Q Please turn to Exhibit A in your declaration.

A Yeah. I have it.

Q And you were in the courtroom this morning when Mr. Niemann was testifying?

A Yes, I was.

Q And so there was some -- some discussion of this document. But can you describe generally what you did in this particular document?

A Excuse me. Yes. This was meant to try to quantify what we thought could be the overall quantum of fees that were possible to be earned under the engagement letter, given that there were no caps and credits involved in the letter.

We tried to look at what the total fees that Houlihan could earn from the beginning of their engagement through to completion of a transaction, of confirmation of a plan. Given that there was a premium for getting the plan confirmed within 180 days of the filing, we prepared two potential scenarios. One was a filing just prior to that, so that they would earn their premium, and one was an assumption of a confirmation I think three months later, at the end, in December, so that

that could be an example of what they might earn without the premium but with the additional monthly fees.

Q Okay. Now, you heard the representations made to the Court this morning about a 30 percent discount to the financing fees. Do you recall that?

A Yes, I do.

Q Have you had a chance to figure out what the effect of that 30 percent discount would be on this particular exhibit?

A I've just had an opportunity to do a back-of-the-envelope calculation of what that would look like, yes.

Q And what is your back-of-the-envelope calculation?

A Well, if -- nothing changes in the first four lines, obviously. If the financing fee of -- on the ABL would be at 70 percent, that I think would be 2.4. I understand from Houlihan that they are agreeing not to take any fee at all on any Blue Torch exit facility. This was done purely in the four corners of the reading of the engagement letter. There was no clear statement in the engagement letter that that fee couldn't be earned. And the disclosure statement had a clear object of potentially a revised Blue Torch exit facility, and it wasn't clear that that might or might not be charged.

So, obviously, on the representations of Mr. Niemann, that would come out in its entirety.

And then the $4.2 million, I've heard this morning that there may or may not be a rights issue involved. If there

isn't, then obviously that fee doesn't come. If there is a rights issue of some nature, I've heard Mr. Niemann I think say he would get whatever 70 percent of six percent would be from whatever source of financing that rights issue came from.

So I don't have it -- and the monthly credit would be the same, I think. So, I think I calculated that the -- if there was no rights issue and no Blue Torch, I think the total quantum of fees in this middle column would be somewhere in the $11 million range. I believe that's how I calculated it.

Q Okay. The number at the bottom, as percentage of prepetition debt, says $630 million. How did you come to that number?

A The $630 million was the -- was taken from the first-day declarations of the company. It's the $130 million of Thirty Two revolving credit and the $500 million of senior notes.

Q You were in the courtroom this morning when there was some discussion on Mr. Niemann's cross-examination about the inclusion of operating leases. Do you recall that?

A Yes, I do.

Q Why did you not include the operating lease payments in the prepetition debt?

A For two reasons. One is that there was -- there's no disclosure of any capital leases involved in this company. All these leases are operating leases. So, in the first-day declarations, though, there's no quantification at all of the

obligations of the leases. There's certainly nothing in the disclosure statement. They are noted as a footnote in the 10-K of the company, which is a review of cash obligations going forward. But it's not on the balance sheet of the company and it's not capital leases. So, on that basis, we didn't have any indication of whether there was a capital obligation to include in debt.

And then, second -- and to the extent that it's an operating lease, the 45 companies that we had as comparables, many of those companies would have similar situations where they would have operating leases. And the analysis was done purely on prepetition debt. And there's a number of retail companies where the negotiation of leases, for example, would be a very fundamental part of the activities of the investment banker.

But in no case have I ever seen an analysis where operating leases are capitalized onto this type of analysis to be included in debt. I've just never seen it done.

Q Okay. Why don't you flip over one page, to Exhibit B? Could you describe generally for the Court what Exhibit B is?

A Yes. B is a summary of what I regard as the salient features of every engagement letter that we reviewed. They start from the company and the jurisdiction it was filed in, the date it was filed, the banker involved. And then it goes through the columns of -- of Funded Debt are the prepetition

funded debt done on a consistent basis for every company, so it's adjusted to, for example, exclude unpaid interest at the filing date. It includes letters of credit that are outstanding.

Sometimes, in first-day declarations, you can get a number of different ways of reflecting those numbers, so these are all calculated on the same apples-to-apples basis.

Then there's a monthly fee, indication of what the monthly fee is and an indication of both the amount of monthly that is credited and the number of months after which that crediting takes place. And then there's something we shortly call the RX Fee, which saved me from rewriting Restructuring Fee a hundred times. But that's the transactional completion fee in dollars, and then the next column is the restructuring fee quantified as a percentage of the prepetition debt.

And then we take from the engagement letters just the straight percentages of fees on the financings for both DIP, if it's separated, if it's shown separately in the engagement letter, or secured debt, unsecured debt, and equity.

And then, finally, on the right-hand side, there are four columns which are more qualitative, which is to say where in the engagement -- do these engagement letters have any element of limitation of the overall quantum of those fees through the mechanisms such as either lower fees paid to existing creditors who provided the financing, a specific credit that

might have taken place, such as a percentage of the financing fees offset against a restructuring fee? In many of them, there was a cap, which served to limit the overall quantum of the fee.

And the final column was that there were several cases where there were voluntary reductions made by the investment banker at the end, following, I think, objections to their fees.

Q So, for example, this column that says Lower Fee/Exclusion for Existing Lenders, this shows that the vast majority of the companies that you looked at had some kind of a credit?

A Yes. I think it's fair to say it's a very normal part of engagement letters that if the funding is provided by -- and this could be debt -- this could be DIP finding, a rights issue, it doesn't necessarily mean equity, but it could be any type of funding. It's very frequent that if that's provided by the existing creditor group, then the fees are either lower or forgiven.

Q Okay. Let's step through a few of these numbers at the bottom. What did your analysis show about the proposed monthly fees to be charged by Houlihan?

A So, we -- we have a median, average, high, and low, just to show the range of data points. The median being, obviously, 50 percent above, 50 percent below. Median and average come out pretty close.

But this one told you that the highest monthly we had in this data point was $175,000 a month. The lowest was $50,000. On average, it was about $150,000 a month on -- on the average debt of about $546 million.
Q What did your analysis show with respect to the restructuring fee?
A So, the restructuring fee came out, on average, about .78 percent of prepetition debt, with a low of .3 percent and a high of 1.02 percent.
Q Okay. And how does that compare to what Houlihan was proposing to charge?
A So, the Houlihan fee is below, based on the $630 million, obviously, of denominator, Houlihan's fee just on the restructuring fee is 1.1 percent of the prepetition debt.
Q All right.
A Assuming the $6.9 million, which is the -- with the premium.
Q And what did your analysis show with respect to the financing fees that were proposed by Houlihan before today?
A So, I made the observation that Houlihan's fees of two percent for debt, three percent for unsecured, and six percent for equity were basically on the high side of the range of any of these data points that we see. So, in particular, the equity of six points, that's the highest. And I'm not even sure -- there is one, sorry, two data points in which there

was a six percent fee. So my observation was that their range of financing fees were all at the high end of the comparable range.

Q If you'll look at Exhibit C. What is this exhibit?

A This was a -- we call it a scattergraph, which just puts the data points on a graphic basis. I think it helps to identify where you might believe the market is for the general number of cases involved.

This has, as the horizontal axis, this is the size of prepetition debt, between $200 million and a billion. And the vertical axis is the percentage of the restructuring fee as a percentage of prepetition debt. And it lays out all the data points on the Exhibit B beforehand, and I think it shows the clustering of a large number of cases somewhere certainly below one percent, but it shows a large clustering around the average of .78 percent.

Q Great. And this one is limited to the restructuring fee; is that right?

A This is just the restructuring fee as a percentage of debt, yes.

Q All right. Okay. Turn over to Exhibit D. What is Exhibit D?

A So, Exhibit D is all the same cases, but in this case we looked at -- for most of them, they were transactions that had been completed, so we looked at what the bank -- what the

banker had actually earned from the beginning of his assignment, usually from the engagement letter that related to the restructuring. That might have been prepetition, usually was prepetition. And this was meant to identify all the fees that the banker earned: the monthly fee, the restructuring fee, or a sale fee, the financing fees. And then it reflected the credits that were received or applied to those fees or the cap that was provided.

So that at the right-hand side, there was a Total Fee column, which is the column before the last column, which was the total quantum of fees that were earned by the banker for that restructuring. And the final column was the percentage of that fee as expressed as a percentage of prepetition debt.

Q So what documents did you rely on to get the data for Exhibit D?

A For both exhibits, we relied primarily on the first-day declarations in order to establish the debt that was -- that should be included. We looked at the application made by the banker for employment. We looked at the final order, since a number of the orders did change the terms under which the engagement was to be approved. And then we looked at the final fee applications, which pretty much invariably laid out pretty clearly all the fees that the banker had earned, both prepetition and postpetition. So those were the documents. And we, in some cases, we did refer to the disclosure

statement, just to prove up the debt numbers.

Q And what did you conclude about the all-in fees proposed by Houlihan before today as it compares to the data that you collected?

A Well, this chart, on the bottom right, you can see the average of the total fees. The median is 1.02 percent of total fees to debt. The average is 1.1 percent of the total fees to debt. The highest number, and it was only one -- I think one item that was high, it was two percent of total fees to debt, and the lowest was .52 percent.

But this directed me to regard a reasonable level of fees as being somewhere in the 1.1 percent of total debt range. That would be the average of the data points of the 45 cases that we looked at.

And if you look at the PHI -- the Houlihan case, obviously, based on the earlier analysis, which included a number of fees that I understand will be adjusted, but on that basis this was almost three percent of -- 2.9 percent, and no cap that might have limited any change to the plan if something else changed from the plan.

Q And then what is Exhibit E?

A And Exhibit E is just the same scattergraph showing those data points, those all-in costs as a percentage of prepetition debt, compared, again, to the -- the same axes as in the first graph. And this, again, was just to show the predominance of

deals in the -- around the average, and it showed how far off market the Houlihan all-in fee was, if they were going to earn all the fees that were potentially possible under that engagement letter.
Q Now, you heard Mr. Niemann testify this morning about the -- what he calls a pace premium. I think we called it a speed premium.
A Yes.
Q Have you seen that kind of premium before?
A I have not -- I have not seen it as a typical element of engagement letters.
Q And did you look with respect to the 45 comparables that are on your Exhibits B and D to see whether they had so-called pace premiums?
A It didn't -- yes, I did look. It hadn't immediately -- there were none on this list, as I was aware. I did go back. I heard Mr. Niemann say this morning that *UCI* had a pace premium to it, and so I actually went back and reviewed the engagement letter in that. In that engagement letter, actually, the premium was simply a $500,000 additional fee for a prepackaged arrangement. It didn't -- it wasn't a premium related to the time in which a case was completed. It was just a premium for doing a prepackaged, which would have had the agreement of all the creditors and thereby would have limited the time spent in bankruptcy, which that is a normal

-- it's not abnormal for banks to be motivated to try to do a prepackaged or pre-arranged deal to limit the amount of time. But that's normally done in the form of a -- maybe a slightly higher transaction fee. But the idea of a pace premium is not anywhere in any of these examples that we looked at.

Q Okay.

MR. STONE: I'll pass the witness.

THE COURT: Thank you. Mr. Califano?

MR. CALIFANO: Your Honor, if we could just take a five-minute break?

THE COURT: Sure.

MR. CALIFANO: Thank you.

THE COURT: We'll take five minutes.

THE CLERK: All rise.

THE WITNESS: May I step down?

THE COURT: You may step down. During your testimony, don't -- excuse me. During the break, don't speak with anyone about your testimony.

THE WITNESS: Yes, sir.

(A recess ensued from 2:17 p.m. until 2:23 p.m.)

THE CLERK: All rise.

THE COURT: Good afternoon. Please be seated. Thank you very much.

Mr. Califano?

MR. CALIFANO: Yes, Your Honor. Thank you. I'll be

right there.

CROSS-EXAMINATION

BY MR. CALIFANO:

Q Good afternoon, Mr. Lewis.

A Good afternoon.

Q Now, how did you come to be hired by the Creditors' Committee to opine on the Houlihan fee?

A I was approached by Oaktree initially, who I had done some work for, as I mentioned, on another case. And we had been successful in that case. And so Oaktree had this situation and called me up and asked me if I was willing to provide testimony on this one.

Q And who called you from Oaktree?

A Initially, Grant Nachman e-mailed me, and then a gentleman called Mahesh Balakrishnan, I think is his name, called me.

Q Did you produce that e-mail? Was that e-mail produced?

A Yes, I did.

Q Okay. Now, when you spoke to Oaktree, what did they tell you about the Houlihan fee?

A They outlined a little bit of their views of what the fee -- what they thought the quantum of the fee was. I think it's in the -- it's in the e-mail that they sent.

Q I can look at your deposition. Now, you were deposed by my partner, Mr. Hynes, correct?

A Yes.

Q On April 24th?
A Yes, sir.
Q And he asked you the same question I asked you, "What did he tell you about the Houlihan fee?" And this was your answer. "He told me what was in the application and told me that Oaktree thought it was too high."
A Yes.
Q "That was it." So, before you were retained, you knew that your putative client had formed an opinion about where -- where you should come out, correct?
A Well, he asked me, he -- he gave that information and he asked me if I would review --
Q Well, he told you, he said it was too high, correct?
A Yes.
Q Okay.
A Yeah.
Q So you were told by the person who was going to hire you on behalf of the Committee that he believed it was too high, --
A Yeah.
Q -- correct?
A Yes. Correct.
Q So did that indicate to you at all where your opinion should come out?
A He asked me to review the application and --

Q That's --
A -- asked if I --
Q That's not my question.
A May I answer --

MR. STONE: Your Honor, if he could allow him to finish his answer, I'd appreciate it.

MR. CALIFANO: But it's non -- I'm --

THE COURT: Well, then you need to say nonresponsive so I can rule on that.

MR. CALIFANO: Okay. Thank you.

THE COURT: I sustain on nonresponsive.

THE WITNESS: I'm sorry. Can you ask the question again?

BY MR. CALIFANO:

Q The question was -- I forgot what the question was now. What was the question?

THE COURT: I'm afraid our system doesn't work like that, Mr. Califano. You'll have to go back and --

MR. CALIFANO: No. We'll just go through it again.

THE COURT: Yeah.

BY MR. CALIFANO:

Q So, Oaktree -- and this is from your deposition testimony. We can read it again if we have to. But they complained to you that there was no crediting mechanism, correct?
A I'm not sure. They just --

Q Well, I can just go to your deposi...
A They said that it was a high level of fees. And I don't recall if they specifically said there was no credit.
Q Okay.
A But they were concerned with the total quantum of fees, yes.
Q Is it -- this is a question that Mr. Hynes asked you on April 24th. "Is it fair to say that Oaktree was the first one to complain that the Houlihan fee application had no crediting mechanisms?" And your answer was yes.
A Okay. Yes.
Q Okay. So that didn't influence the way you came out on your opinion at all?
A As I was about to say, I was asked to review the motion and then asked if I would give the opinion based on my review of Houlihan's fee letter, which I did independently of Oaktree's comments.
If I had thought it wasn't a reasonable thing to provide testimony, I wouldn't have done it. So I understood where Oaktree was coming from, but that didn't -- that didn't bias my response. I looked at the motion and the application; then I took my own decision as to whether I thought it was a high fee and therefore whether I would accept the assignment.
Q Okay. So the fact that the person who contacted you to come into this case told you that it was too high and pointed

to the crediting mechanism, that had no bearing on what you did?

A No, it had no bearing on my decision to accept the assignment and --

Q It --

A -- and then the work that I did.

MR. CALIFANO: Move to --

BY MR. CALIFANO:

Q It had no bearing on the work you did? So, what would you have done if you did your analysis and said, you know what, this comes right within what I think is reasonable?

A If I had -- I wouldn't have accepted the assignment to begin with. I would have looked at it -- I wouldn't have accepted the assignment if I had thought there was not -- because we had just finished on *David's Bridal* something very similar and had concluded a similar issue.

Q Okay. So let's just step -- what -- so, what analysis did you do before you accepted the assignment? Because you said if you didn't agree you wouldn't have accepted the assignment. So what did you do?

A Well, I had already completed -- the assignment that we did for *David's Bridal* had pretty much all these companies -- all the companies for 2017 and '18, I had already analyzed for a prior case. And so I was fully -- I was fully aware of the comparables that we used in the *David's Bridal* case.

So when I looked at the Houlihan situation and I took a shot at trying to understand the quantum of their fees myself, and on the basis of what I had understood in *David's Bridal*, I had concluded that I was likely -- it was likely to be that those fees were going to be high, I was going to find that they would be high, and therefore that's why I accepted the case.
Q Is this -- so, what was your role in *David's Bridal*?
A I'm sorry?
Q What was your role in *David's Bridal*?
A I worked for the lender group in the objection to Evercore's fees in that case in Delaware.
Q Okay. And is there any difference between this case and *David's Bridal*?
A Generally, no. It was about an 800 -- it was a slightly larger case, about $800 million of debt. And the fee there for Evercore was about $13 million, and it was reduced to $10 million on the settlement.
Q Now, you said the last time you were involved as a debtor professional was in 2010 and the last time you testified on behalf of an engagement was in 2009, correct?
A Yes.
Q Okay. Have things changed at all since 2009?
A As I mentioned earlier, the structure of engagement letters hasn't changed at all, but the economics of them

obviously change over time based on the competitive environment of investment banking. But, so the fee levels change over time, and because I had reviewed 25 of those in 2017 and '18, I had a pretty good sense of where the current market was for the general level of fees on these types of engagements.

Q But how --

MR. CALIFANO: See, it's difficult because I don't want to interrupt the witness, but he keeps pausing, so it's tough for me, Your Honor.

BY MR. CALIFANO:

Q But, overall, have fees gone up or down since 2009?

A I think fees have actually gone down since 2009.

Q Really?

A I was surprised, actually, at the level. When I look at these overall fees, I was surprised at how many of them came in within the $3 to $5 million range for companies of this size.

Q And --

A And I thought that was -- in general, my experience and memory was that fees were somewhat higher in those days.

Q Really? So the only thing that hasn't been affected by inflation is investment banker fees?

A It's a competitive environment and people -- there are quite a large number of investment banks out there competing

for the same business, so --
Q And there wasn't any competition in 2009?
A Less.
Q Okay. Now, so in the *Fleetwood* case, do you remember what the monthly fee was that you were seeking to have the Court approve --
A Yes, I do.
Q -- in 2009?
A Yeah.
Q And what was that?
A So, the package was an initial retainer fee of a million dollars prepetition, no monthly fee for the first two months, $200,000 for the next -- for after the first two months, with crediting --
Q So $200,000 wasn't too high in 2009, but it's too high now?
A The case in *Fleetwood* was a very unusual case.
QA That's --
A May I --
Q I didn't ask you for the difference. But in 2009 -- in 2009, $200,000 a month was fine, but now you're saying $200,000 a month by Houlihan is too much?
A I'm saying the $200,000 in the case of *Fleetwood* was a structured fee because it was extremely -- it was extremely timely and we didn't think we would earn -- and it was

potentially going to liquidation and we didn't think we would earn any of the final fee. We weren't sure of that. So we had a higher monthly, I agree that it was a high monthly, but that was structured because we weren't sure whether we would even get the transaction fee or the sale fee, because it could have gone to liquidation.

Q Well, actually, the first two months are at $500,000 a month, right? Because you got a million for up to the first two months?

A Prepetition, there was another two months.

Q Right. But those are --

A So the million --

Q -- for the two months?

A -- covered four months, I think. The million was at least a month and a half prepetition.

Q All right. So then if -- so then it was three and a half?

A Yes. It was --

Q What's it, three and a half, four? It's still --

A Yeah. We were looking --

Q It's still more than $200,000 a month, and then it dropped to $200,000 a month?

A We were looking to be sure that we were compensated for a significant amount of work on both DIP, M&A, and potential plan, in a case where we might have not got past three or four months and we might have not got anything else.

Q Well, --
A So, yes, we -- we frontloaded it to ensure that we had good compensation in case it didn't go to a final plan.
Q So is it your expert testimony that it is appropriate to charge higher fees if you don't know where the case is going? Is that what you're saying?
A No. I'm saying that in the specific case of *Fleetwood* it was a -- it was at the bottom of the financial recession. It was extremely hard to find financing. And our judgment at that time was that we weren't sure whether we were going to make any money on the case. And so we requested a fee structure that was compensating us for a very intensive process which we felt would have been fair in a case where it might have ended up in liquidation. We would have made a million dollars or something out of it.
Q All right. Let's -- we'll talk about comparing that case to this case in a second, but do you recall what the unsecured financing fee was in that case to your firm?
A Yes. I believe it was two --
Q And what was it?
A I believe it was two percent, yes.
Q And two percent is -- you've said is too high for Houlihan in this case?
A I said that based on the comparables we had for the current market, two percent was at the high side of the range,

yes.
Q And what was the fee for unsecured?
A In--?
Q In your case.
A *Fleetwood*?
Q *Fleetwood*. Your last case.
A I actually don't recall.
Q It was five percent.
A Five?
Q Would that shock you?
A No, I think it was three --
Q Oh, I'm sorry.
A It was three percent, and five percent for equity, yeah, I think.
Q Right. And what are the fees for Houlihan?
A They're six percent for equity and four percent for unsecured.
Q Didn't they reduce them, though, today by 30 percent?
A My analysis -- yes.
Q Okay. So, with the reduction -- and by the way, do you think the fees are reasonable now that they've been reduced?
A I would -- so, I -- I think the issue that we have is that -- that I have is --
Q And --
A -- that I don't think it's reasonable. On the -- on the

proposal that has been made, my opinion would be that the normal crediting of financing fees is higher than 30 percent, when it's provided.
Q Provided by whom?
A The normal fees --
Q Provided by whom?
A Provided by existing creditors.
Q Okay.
A That when you have a rights issue provided by noteholders, in the cases that we presented, I think about five of those cases had rights issues, and the fees were well below two percent. So a 30 percent credit on six percent would still be -- would still result in a very high fee for a rights issue provided by existing creditors.
Q But that's out of the plan, right? It's out of the plan now, the rights offering?
A Yes. But my point would be if that -- if the engagement letter comes and says that Houlihan will not get any fee for any sort of rights issue whatsoever, that would be fine, but they're not saying that.
Q That'd be fine?
A They're not -- if there was a cap or a credit that said Houlihan agrees that under no circumstances would they earn a fee for a rights issue provided by existing creditors, that would be a factor.

Q And is that, you believe, market, that there should be no fee for existing creditors?
A The market, the five cases that we had in our comparable, all five of them have a fee that's below two percent, so --
Q Okay. And how many cases involved rights offerings in the last --
A Well, --
Q Since you -- in 2009, how many -- how many cases had rights offerings since 2009?
A I couldn't -- I couldn't put a number on it.
Q So do you think it's fair to pull five out?
A I'm saying that -- no.
Q You pulled out five. You said you had five in your sample.
A I said that in the 45 of all the cases between $400 million and $800 million, there was specifically five cases in which rights issues were done with money provided by existing creditors. Many of the cases that we looked at had reduced fees. I'm just pointing to the ones that actually had a rights issue that was implemented with noteholder money. But --
Q Let me ask you a question. When you were comparing the fees in your charts here, right, --
A Yeah.
Q -- did you compare -- you said you compared the Houlihan

potential fees to the actual fees granted by the courts, correct?

A Yes.

Q All right. Now, isn't it true that in almost every investment banking letter there's a number of fees, not all of which apply? And we've heard Mr. Niemann testify before that he clarified, if a transaction has more than one potential fee, he's only going to seek one. How would your charts change if you compared apples-to-apples? That is, if you compared potential fees to the potential fees that each one of these bankers could get?

A Well, first of all, I'd have to go back and compare each plan.

Q So you didn't do it? You didn't do it?

A We didn't, because the --

Q That's all I need. All I need is that you did not do it. Thank you. Can we turn back to Exhibit A?

THE COURT: And we're in 33; is that right?

MR. CALIFANO: Yes. I'm sorry. Exhibit A to his declaration, Your Honor.

THE COURT: Uh-huh.

BY MR. CALIFANO:

Q Okay. So that's the calculation of potential fees.

A Yes.

Q And you have a total number of prepetition debt, right, of

$630 million?
A Yes.
Q Now, that number carries through every other chart, correct?
A Correct.
Q So if that number is wrong, then every other chart has to be adjusted, correct?
A I'm sorry. In terms of the chart, Exhibit B?
Q Well, all your -- what do you call these? The bunching together? What do you call those charts?
A The scattergraphs?
Q The scattergraphs. The scattergraphs. So all your scattergraphs would have to change, correct? They all assume --
A No, the scattergraphs wouldn't. The only number that would change would be the Houlihan number.
Q Right. So, where they were placed in the --
A Yes.
Q -- scattergraph would change? So that's everything.
A Well, where the Houlihan, which is the triangle, where the Houlihan would --
Q Right. But all we care about, right, is where Houlihan --
A Yeah.
Q -- falls on this chart?
A Yes.

Q Right?
A Yep.
Q So you say only that would change: That's changing everything, right?
A I'm sorry. I --
Q Because nobody here really cares about --
A I'm --
Q -- some of the other cases. We're here about this case and the Houlihan retention. So that would have to change if your number on total funded debt changed, correct?
A Yes, correct.
Q All right. So you have $630 million, which is the notes, right?
A Yes.
Q And the Thirty Two, LLC loan, correct?
A Yes.
Q Did you put any unsecured debt in there?
A No.
Q Any trade? No? Okay. You didn't include the Blue Torch. Now, that was funded and owed by the company as of the filing. Whether or not your clients like it or thought it was right, that's for another day, but that was debt that existed as of the petition day, correct?
A Yes.
Q So why didn't you include it?

A Because it was, per my notes, it was effectively a DIP financing.
Q What does that mean, effectively a DIP?
A Well, the preamble of the Blue Torch facility said that it was done in contemplation of a filing promptly after the loan and that it was put in place to fund the costs of liquidity of a Chapter 11 case. So that's basically a DIP financing. The company chose to do it two days before filing. That's fine.
Q But if it was out three months before, would it make a difference?
A That might have made a difference, yes.
Q Why? It's still the money --
A Well, it might not have been -- it might not have been in specific expectation of a filing. I don't know.
Q But what does -- how does that influence whether or not the debt -- the debt still needs to be dealt with in a plan, correct?
A Yes.
Q Okay. A DIP doesn't, because a DIP requires that it's paid off at confirmation, so it's different. And you don't deal with a DIP in a reorganization because the DIP has to be paid off, correct?
A Yes.
Q Okay. So this is not that.
A The analysis was of fees to be earned as a percentage of

prepetition debt, and in all these --
Q That's still pre -- that is prepetition debt, though.
A Yes. But in all these cases, there were -- many of these cases had DIP loans. And if I had wanted to do apples-to-apples, I would have had to have added the DIP loan to every case that was comparable --
Q No, you would not.
A -- in order to show --
Q No, you would not.
A Because this was a DIP loan in my mind.
Q It's not a DIP loan.
A I understand you --
Q It's prepetition. And a DIP loan, there is nothing to do about it. Right? Because it has to be paid off at confirmation. This still needs to be dealt with. So, in fact, --
A There's --
Q Let me ask you another question. In those cases with the DIP loans, would that investment banker have been able to charge a different -- an additional fee for obtaining that DIP?
A Well, you'd see from the comparables that there are -- there are -- it's all over the place. There are DIPs that did have a fee, DIPs that didn't have a fee, so I --
Q Do you know how many of them?

A I would have to go through and detail them specifically.
Q All right. *Philadelphia Energy*, that was one of your cases, right? That's in your chart.
A Okay.
Q Okay. Did PJT -- was PJT entitled to a DIP fee in that case?
A If you don't mind, I would -- I would refer to the notes that were also Exhibit F. So, on that one, there was a 50 percent of the DIP fee was credited against any capital raise fee applicable to financing of a first loss position that was done with an affiliate. Otherwise, the DIP fee of $1.2 million was earned and paid prepetition. So, yes, there was a -- there was a DIP fee paid to PJT.
Q Okay. So, *VER Technologies*, okay, another PJT case, was there a DIP fee in that case?
A In fact, under the final retention papers on -- *VER Technologies*?
Q *VER Technologies*.
A PJT actually agreed to take no financing fee on the approved restructuring --
Q Really? I have the -- I have the engagement letter right here.
A But I have the final fee -- that would have come from the final fee application, where they --
Q But I thought you were comparing potentials, not final

fee.
A And the --
Q I thought you were comparing potentially -- that's what you would -- oh, I'm sorry. That's what you're doing for Houlihan. I forgot. I apologize. It's only for Houlihan that you're comparing, right, the potential fees.
A So, in the -- I believe --
Q In the letter, though, there was a right to a fee, wasn't there, in the PJT letter?
A I would have to go back and look. I know that on my --
Q Well, I can help you out. Can we have that? Can I have the *VER Technologies*?
MR. CALIFANO: Your Honor, may I approach?
THE COURT: You may. Thank you.
BY MR. CALIFANO:
Q Can you please turn to the bottom of Page 2?
A Yes.
Q Okay. And the carryover paragraph, Romanette III, the carryover paragraph?
A Yes.
Q Okay. Does that help you with respect to whether or not they could be entitled to a DIP fee?
A Yeah. This looks like that they would be entitled to a one percent --
Q Okay.

A -- fee on senior debt, yes.
Q So, in your chart, you really effectively penalized Houlihan twice, because you took the Blue Torch $70 million out and then you also tried and credit against them their prepetition fees, correct? Excuse me.
A I'm sorry. I was just reading the remainder of the paragraph where there was a reduction of the fee when provided by creditors, but I --
Q Well, is Blue --
A I'm not sure if that relates to this case or not.
Q Yeah, it doesn't, does it? Because Blue Torch was not a creditor --
A Yeah.
Q -- at the beginning.
A That's correct, yes.
Q So, okay. So, do we have to go through all of these? But if I -- would you take my representation that one, two, three, four, five, six, seven, eight, nine of your comps had DIP fees in the engagement letters, so we don't have to go through each one of them?
A I'm sorry. Just DIP fees on their own that were charged?
Q That the engagement letters --
A Yeah.
Q -- had DIP fees?
A Yeah.

Q Okay.
A Right. That seems reasonable.
Q So you're penalizing Houlihan twice here by taking the $70 million out of the base that you calculate and then crediting -- and arguing that they -- not giving them credit for another fee that they would have gotten as a DIP, correct?
A I don't think so.
Q Okay. Well, I do. You talked -- *David's Bridal*. What kind of business was that again?
A I'm sorry. Say it again?
Q What kind of business was *David's Bridal*?
A Oh, *David's Bridal*?
Q Yes.
A A retail --
Q Okay. Retail?
A Retail bridal business.
Q Is a retailer different than a helicopter company?
A Yes, of course.
Q Okay. And are retail leases different than helicopter leases?
A Yes.
Q Okay. Do you think that helicopter lease restructuring -- that lease restructuring is important in a helicopter case?
A Yes, I might, yes.
Q Okay. Do you -- would you -- now, in *CHC*, are you

familiar with the fact that CHC hired another firm, Seabury, to do the lease restructuring, correct?
A Correct.
Q And Houlihan is doing that here.
A But it's a totally different number of, as we said, *CHC* has a billion three of operating lease obligations compared to $140 million in PHI, so there's a totally different level of activity, I think, in *CHC* than Houlihan would have here.
Q It's still part of the obligations --
A Yes.
Q -- that Houlihan needs to deal with, right?
A Well, it's still part of the activities, for sure. In every other case, --
Q But it's still an obligation. You said $130 million. An obligation that Houlihan has to deal with.
A My answer would be that on all the other cases that -- for example, you talk about retail. The investment banker would spend a lot of time also negotiating and thinking about rejecting and assuming retail leases. So in all of these comparables where there are operating leases, it would be fairly normal for the banker to be actively involved in the analysis and negotiation of leases. There may be different types of leases, and I agree that helicopter leases --
Q But you think the analysis is the same dealing with a retail store lease as opposed to restructuring a multimillion

dollar helicopter lease, when you need the helicopter to operate? I mean, you think it's the same thing?
A Well, I think there's --
Q I'm just asking you if you think it's the same thing.
A It's not -- obviously, it's not the same thing.
THE COURT: Let --
MR. STONE: Your Honor, again, if he would --
THE COURT: I'm about to --
MR. STONE: -- just allow him to answer, it would really be --
THE COURT: I think I was about to say the same thing, Mr. Stone.
MR. STONE: Yeah.
MR. CALIFANO: Okay.
THE COURT: If you would, Mr. Califano, let him finish his answer.
MR. CALIFANO: Yes, Your Honor.
BY MR. CALIFANO:
Q When you prepared Exhibit A, why did you put the prepetition fees in that top line?
A Because my analysis on Exhibit B, my -- the way I think the best -- this is best analyzed is to look at all the fees that are earned in -- under one engagement letter, whether it's pre or post, partly because there's a lot of these cases where there's quite a bit of crediting of prepetition fees.

So, in order for it to be, I think, a good, useful analysis, my view is that you look at the all-in fees earned from the beginning of the engagement letter forward, so --
Q Did you look at that for all your comparables?
A Yes, I did.
Q You did?
A Yes, I did.
Q You went back and you went --
A Yeah. That's what I --
Q -- through every one of them?
A That's what I did.
Q Okay. Now, what do you base -- now, if a court is looking -- a bankruptcy court is looking at the reasonableness of the fees, do they typically look at prepetition fees?
A I'm -- yes, because I think in the -- in a lot of the declarations, there's always a declaration of how much has been earned prepetition, and I'm sure that the courts must take into account what the banker has earned prepetition as well as what he expects to earn postpetition, particularly when there are credits involved in the postpetition agreement versus prepetition fees, for example.
Q Can you cite to a bankruptcy court decision when the -- where the court took into account --
A I can't cite a decision, no.
Q Can you cite to any treatise where --

A No.

Q Okay. Can you cite to any, any source for your specialized knowledge as an expert in fees that --

A It was just my judgment of doing it for 30 -- 25 years, that those were the types of considerations we took into account.

Q And who is we?

A I, as the investment banker, in Greenhill, Miller Buckfire, Blackstone, and Wasserstein Perella.

Q Okay. So how did you take it into account in your role as an investment banker?

A I'm sorry. How did I take what into --

Q How did you take it into -- how did you take it into account in --

A The total of prepetition --

Q Yeah. How did you?

A Oh. I'm sorry. That most of these engagement letters were done -- would have been done several months or maybe a number of year before you ended up filing. So engagement letters were usually a total fee that you were going to earn, some of it prepetition, some of it postpetition. And the negotiation that took place would have incorporated all of the fees that you were going to earn, some of them prepetition and some of them post.

Q Let's talk about the pace premium or what you would call

the speed premium. Why is that not reasonable?
A I think I -- I had said I thought that there was sufficient incentive for the investment banker to generally get the case done on a rapid basis, both because his fee is a fixed fee generally, and so the quicker that he can earn his fee the better it is for them, and usually the monthly crediting was the manner in which bankers were incentivized to move a case along, because after a certain period you would start getting credits, as in this case. Your monthly would be credited. And so the longer it went on, the less you earned on the monthly.
So, in general, I felt that in most cases you didn't need to have an incentive to the banker to move quickly because he was already incentivized to do that.
Q Well, I think in your calculation on Exhibit A to 33, you have them earning $600,000 more in monthlies, okay, so --
A But overall I have them earning less.
Q But that's because of the pace premium, --
A Yeah.
Q -- right? Okay.
A Yeah.
Q So, absent the pace premium, --
A All right.
Q -- there wouldn't be an incentive to move things quickly?
A This happens to be the way the monthly crediting worked,

yes.
Q Okay.
A And --
Q So the pace premium does have a role here, correct?
A It potentially has a role here to move it --
Q Okay.
A -- forward.
Q What would be -- if the case comes out within the pace premium time, how much more would Houlihan earn?
A Well, they didn't -- I mean, the restructuring fee is $900,000 more.
Q So, it'd be nine --
A And what do you comparison against?
Q What would -- what would -- okay. So, say if the case lasts five months and 29 days, how much more do they make than if the case lasts six months and one day?
A Yeah, that's pretty much what we tried to lay out, was they --
Q Yeah. So what is that number?
A They would earn about $600,000 more.
Q Six hundred thousand?
A Under this analysis, yes.
Q All right. So do you -- what do you think the monthly administrative expenses are for this case?
A I'm sure they are substantially more than that, yes.

Q Do you think they exceed $600,000?
A I don't know, but I know these cases are expensive.
Q If you look around this room, you probably have $600,000 today, probably.
A I'm sure. Yeah.
Q So, and is there wear-and-tear on a company for being in bankruptcy?
A Yes, I agree.
Q Okay. And there are higher costs, other than professional fees?
A I would -- yes, I imagine so.
Q Okay. And is it disruptive to the company and their relationship with customers?
A In general, it, depending on how it's managed, yes, it can be disruptive.
Q Okay. And does it cause problems with employees?
A Yes.
Q Okay. So do you think that all those problems, plus the administrative expenses, right, for my firm, for Milbank, for Milbank's local counsel, for the rest, do you think that the total sum of that, if the case goes seven months, is more or less than $600,000?
A I agree. It's probably -- the expenses, I'm sure, would be more than $600,000, yes.
Q Okay. So there's a benefit?

A Yeah.
Q Okay. And the benefit is increased the sooner they're out?
A I agree.
Q Right?
A Yes.
Q Okay. And the longer we're in, the less -- the more it costs the company, correct?
A Yes, I agree.
Q So, looking at it that way, do you still think the premium is unreasonable?
A Well, my comment was that the premium was unusual because there's no other cases that have it. But I agree that it's not unreasonable to have a motivation to move --
Q There's a lot that's unusual in this case, but unusual doesn't always mean improper, does it?
A Not necessarily.
Q Okay. But here, there is a benefit? You will admit there is a benefit if they meet the pace agreement?
A Uh, --
Q There's a tangible dollar benefit?
A Yeah. I agree.
Q Okay. Now, when was the last time you testified in court?
A It would have been on the *C&J Services* matter.
Q Okay.

A In Houston.
Q And what happened in that case?
A We were seeking a motion for an equity committee, and that motion was rejected.
Q Okay. That was before Judge Jones, right?
A Yes, it was.
Q Okay. And you were there as the valuation expert, correct?
A Yes.
Q What did Judge Jones think of your testimony?
A He didn't think much of it.
Q Yeah. He was highly critical of it, wasn't he?
A He was critical without us understanding what he was critical of, but yes, he was critical of it, yes.
Q He was critical of your testimony in particular, correct?
A I think he was critical of the whole process.
Q All right. This is from Judge Jones' oral opinion in *CJ Holding Company* on November 4, 2016. And he stated on Page 204, "I also read the expert report. And while I didn't choose to exercise the right that I had to ask questions, I could have, and I will tell you there are things in that expert report that bother me a great deal. There are conclusions that could not possibly have been reached. There are conclusions that the witness was not qualified to give." Is that --

A That's the statement. Yes, that's from the transcript.
Q Isn't that really what's happened here? Didn't you get hired by Oaktree, being told they had a problem with the fees, didn't you compare actuals versus potentials, didn't you deduct numbers arbitrarily to fit this thing within your chart that I can't remember the name of? Isn't that what happened here?
THE COURT: Hold on, Mr. Lewis.
MR. STONE: Your Honor, I object. It's argumentative and compound.
THE COURT: Compound.
MR. CALIFANO: Okay. I think I made my point. Thank you, Your Honor. I don't have any further questions.
THE COURT: Does anyone else have any questions of the witness before Mr. Stone gets the witness?
All right. Mr. Stone, your witness.

REDIRECT EXAMINATION

BY MR. STONE:
Q Mr. Lewis, you were asked about the *Fleetwood* matter. What were the circumstances of your retention in that case?
A That case was a case we were asked to be involved in where the company was rapidly running out of cash. It had about three or four months of cash left. And this was in the depths of the financial crisis in 2008, early 2009. And we were asked to step in and try to figure out a way to save the

company, either to sell it in parts or whole, or potentially to try to restructure it, but that was highly unlikely. And every indication was that, if we couldn't do that, it would move into liquidation pretty quickly.

Q Okay. And why were the fees structured the way that they were?

A So, as I said, we structured it because we thought that we might spend two or three months in extremely active work. We, as a firm, don't bill by the hour, so we, like all investment banks, billed monthly. So, in that circumstance, we felt that we wanted to structure it so that if we spent three months of highly-active work but then it turned out that we couldn't save the company and it was liquidated, we wanted to be compensated in some way for that extreme press of work that we would have done.

So we front-ended the agreement where we had a million dollars paid prepetition. And that ran through the -- into the third month of postpetition without any other fees, and then we went into a monthly fee thereafter. A hundred percent of those monthly fees were credited against any final fee, and the total fee was capped at $3 million on a business that had $320 million of debt. So our total fee was basically $3 million on $320 million, about one percent of debt.

Q And what was the environment like in 2009 when you did the *Fleetwood* case, in terms of the supply and demand for bankers?

A Well, it was pretty active. And, yeah, it was -- it was a very busy time and the financing market was extremely difficult. Very hard to find financing for a company of that nature with those problems.

Q Now, Mr. Califano took you through some questioning about whether you were looking at actual fees and comparing them to potential fees. Do you recall that?

A Yes.

Q On your Exhibit B, --

A Did you say Exhibit B?

Q Yes.

A Yes.

Q When you looked at the -- you looked at the monthlies and you looked at the restructuring fee and you looked at the financing fees that were contained there, were you -- were those potential or were those actual?

A These would have been all potential. These were in the engagement letter, so no indication as to --

Q Right. And so at the bottom, where you did your analysis of the proposed Houlihan fees, you were comparing potential to potential; is that right?

A That's correct.

Q Okay. In terms of a DIP fee, if you go -- if you turn back to Exhibit A, how did you treat the Houlihan fee on the Blue Torch facility?

A Well, we include it in the total fees that Houlihan earned on the assignment. We -- even though it was paid prepetition on a two-days-before-petition financing, we -- I believed that to be essentially a DIP financing, a good financing, presumably. But they -- we included the fee in there because our analysis of all-in fees went back to the beginning of the engagement for all of the comparables, and therefore it made apples-to-apples comparisons appropriate to look at all the prepetition fees that related to the specific assignment that was under the engagement letter.

Q Finally, tell the Court a little bit more about your testimony in the *C&J Services* matter. Why was the Court unhappy with that testimony?

A Um, --

MR. CALIFANO: Objection, Your Honor. How does he know why the Court was -- how does he know why Judge Jones was unhappy with --

MR. STONE: I'll withdraw that part of the question.

THE COURT: Why don't you rephrase your question, Mr. Stone.

MR. STONE: Yes, Your Honor.

THE COURT: This time, don't speculate.

MR. STONE: Yes.

BY MR. STONE:

Q Tell, the Court more about your testimony in the *C&J*

matter.

A We provided a -- we were asked to step into a situation about a month before confirmation of that plan by a number of hedge funds who were unhappy with the structure of the plan. That plan had proposed a valuation for C&J for $700 million against a total prepetition debt of between $1.4 billion and $1.5 billion. And a number of the hedge funds were unhappy with that valuation.

There was also a rights issue being done at a discount to the $700 million, the $600 million.

And we were asked to prepare a valuation that would give the Court some level of comfort that there was an argument to be made that there might be value above the $1.5 billion of debt that ought to go to the equity.

So we prepared a pretty top-level valuation. We understood that it wasn't a detailed -- we didn't have access to the company's cash flow projections and the like. But we took a general understanding of the way companies were trading at that moment, and at that point there was a great expectation that the oil business was going to turn around in 2017 and that it was going to go back up. And so all the stocks were trading significantly -- at a significant premium, even though they were all -- most of the services companies were negative cash flow, the stocks of undistressed companies were looking good.

And our argument was that this company probably should be worth $2-1/2 billion plus, based on direct comparables of similar companies in its business. And we made that proposition to the judge. And it was -- and we accepted that it was a very high-level analysis. And, in fact, the judge rejected it. He -- they went forward with that plan at $700 million. And on day one of the plan, the equity traded at $41 a share with 50 million shares outstanding. So the market valued that business at $2-1/2 billion on the day of the confirmation of the hearing.

And we felt that our valuation had been justified. We believed it was a fair valuation. It just -- it wasn't accepted in the context of the case that was heard. But we think that the actual value that the market showed that company to be worth vindicated our valuation, at the end of the day.

MR. STONE: No further questions.

THE COURT: Does anyone --

MR. CALIFANO: Your Honor?

THE COURT: Anyone else have any questions for Mr. Lewis?

MR. CALIFANO: I just have a couple of recross.

THE COURT: Okay.

MR. CALIFANO: I'll be very brief, Your Honor.

RECROSS-EXAMINATION

BY MR. CALIFANO:

Q Just referring to Exhibit B, --

A B?

Q B, your --

A Yes.

Q -- declaration. That's -- the assessment of Houlihan still depends on limiting the funding -- funded debt to $630 million; is that correct?

A Yes.

Q Okay. So its position in this chart would change if the Blue Torch financing was included, correct?

A Yes.

Q Okay. And it would change once again if you counted the helicopter leases?

A Correct. My -- my --

Q Thank you.

A My judgment would be that's not the correct analysis.

Q Okay. But I just asked --

A But yes, I agree with you on that, yeah.

Q Okay. Now, you -- I think you were testifying when Mr. Stone asked you about *Fleetwood*, that that was a special case and that was a unique circumstance and the fee reflected that, correct?

A Yes.

Q Okay. Do you recall testifying in a *Fleetwood* case? I'll

just -- and this is your quote. "I respectfully submit that this fee structure, which is similar to fee arrangements which have been authorized in other Chapter 11 cases in which Greenhill and other leading investment bankers have rendered services, is reasonable in light of industry practice, has market rates both in and out of Chapter 11 proceedings, and -- based on the individuals' experience and the scope of work to be performed." Correct?

A Yes.

Q So back then, you were saying it was market?

A I was saying the overall -- the overall structure, which included a $3 million cap, I was saying that number. I didn't define the individual pieces of the structure, but the overall fee I said was --

Q Well, didn't you just say that it was unique based on the circumstances of that case?

A The structuring of it was unique, yes.

Q Okay. So, back then, you said it was market; now you're saying it's unique?

A No.

MR. STONE: Object, Your Honor. Argumentative.

THE COURT: Sustained.

BY MR. CALIFANO:

Q All right. Now, you say in C and -- and we get to *C&J*. You say you were brought in by a hedge fund that was upset,

correct?
A I don't know if it was upset. I was brought in by a hedge fund who argued --
Q Those are your words. How is that different from here? Weren't you brought in by a hedge fund that was upset with the Houlihan fees?
A I don't know how to answer that. I was -- I was asked whether I'd provide testimony from a hedge fund, yes, who --
Q Okay.
A -- was unhappy with the fee level. Yes. Agree.
Q So the same as *C&J*, correct?
A Oh, *C&J* was a much more complicated issue. It was a valuation issue. And it was a much bigger deal and much more complicated, yes.
Q Okay. I didn't read all of Judge Jones' quote about you because I didn't want to go too far, but now that you've brought it up, I feel like I have to. And this is what he said about your report. "But to deliberately cut corners in an effort to mold the truth is something that may be done in other jurisdictions but not in the Southern District of Texas and not in Courtroom 400."
Do you remember him saying that?
A Yeah.
Q Okay.
MR. CALIFANO: No further questions, Your Honor.

THE COURT: Mr. Stone, do you have any other questions of Mr. Lewis?

MR. STONE: I do not, Your Honor.

THE COURT: Mr. Lewis, it's probably not relevant for today, but what was the business of *Fleetwood*? I guess I'm not familiar with it.

THE WITNESS: Oh, a recreational vehicle manufacturer.

THE COURT: Okay. Just big --

THE WITNESS: An RV business.

THE COURT: RVs? Yes. You may step down, sir.

THE WITNESS: Thank you.

(The witness steps down.)

MR. LEBLANC: Your Honor, we have no further witnesses.

THE COURT: Thank you. Does the Debtor intend to call another witness?

MR. CALIFANO: Your Honor, if we could just have five minutes. I'm sorry to impose on your patience.

THE COURT: You're not --

MR. CALIFANO: But five minutes to decide whether we want to do rebuttal or not.

THE COURT: You're not imposing on my patience yet, Mr. Califano.

MR. CALIFANO: Well, Your Honor, we did settle the

other things, so --

THE COURT: All right. You know I'm joking. Five minutes.

MR. CALIFANO: Your Honor, I have to stay in your good graces because tomorrow I've got --

THE COURT: You'll be back. Five minutes. All right.

(A recess ensued from 3:11 p.m. to 3:16 p.m.)

THE CLERK: All rise.

THE COURT: Good afternoon again. Please be seated. Thank you. Mr. Califano?

MR. CALIFANO: Your Honor, we have no further witnesses.

THE COURT: All right. How long would you all like for closing on this motion?

MR. CALIFANO: I don't need long, Your Honor. I don't need long at all.

THE COURT: Ten? Would that be enough?

MR. LEBLANC: That would be fine with me, Your Honor.

THE COURT: Ten per side? And I think the United States Trustee still has a single issue, right?

MS. KIPPES: Yes, Your Honor. I think I can get that done in under five.

THE COURT: Okay. All right. Mr. Califano, you get to go first and last.

CLOSING ARGUMENT ON BEHALF OF THE DEBTORS

MR. CALIFANO: Thank you, Your Honor.

Your Honor, we're here on Houlihan's retention. And, you know, based on the context of this case, as you can tell by the objection, the objection went into a lot of things that really weren't relevant to -- the objection as filed -- weren't really relevant to their retention. Not their qualifications. That stuff, I'm not going to address, but obviously you can see some motivation here.

The Houlihan fee has been revised in response to the creditors' concerns, okay? The vast majority of their concerns related to these potential fees. Now, one fee that they crowed about, Mr. Niemann has said repeatedly, and the order will reflect, he's not seeking anything for the Blue Torch exit.

With respect to the rights offering, those rights offerings have come out of the plan. But we all should remember that the only way that those rights offerings ever came into the plan were if the creditors accepted the plan and agreed to fund. Okay? So it was always in their discretion. It was always their decision. It was not a fee which was going to be imposed upon them. Because, as Mr. Niemann said, if they thought the fee was too high, they would say, well, we'll put the money in, but only if you cut your fee.

So it was a red herring, okay, Your Honor. It was pointed

to. It's out of the plan now. And it was never something that Houlihan could have gotten absent the creditors' approval and consent.

The balance of the fee, Your Honor, is reasonable. $200,000 a month is reasonable, especially under the circumstances.

A number of the comps they're using are prepacks. Very different on the monthlies for a prepack. You don't have the extent of the work that is being done. So I don't think we can look at those prepacks or prearranged cases, or the case where the secured creditor was being -- was bidding in in a 363 sale in (inaudible). I don't think any of those are relevant.

I think the one thing you can take away, probably the only thing you can take away from Mr. Lewis' testimony, is that each one of these cases is different, Your Honor.

In the context of this case, this is an extremely reasonable fee. Okay. You can't ignore the helicopter leases, because as we said from the beginning, one of our major tasks is restructuring those leases. And we're dealing with 15 different lessors and we're valuing helicopters and making deals based on market value. That's significant work. You can't discount that.

You can't discount the Blue Torch facility just because you don't like it or because it's unusual. It still is funded

debt that needs to be dealt with as part of the plan.

So if you put those numbers back in that I think Mr. Lewis arbitrarily took out, well, then it's smack in the middle of all of his charts, Your Honor. And I think that's what's reasonable, and I think that's what's reasonable under the facts and circumstances of this case.

And the Code doesn't say that the debtor-in-possession gets to hire people on market terms. The Code says on what's reasonable. And we think this is reasonable in the context of this case.

Now, the speed premium, Your Honor, I would think the creditors would like that. Well, we call it the pace premium; they call it the speed premium. I would think they would like that, because that saves money. And in a case like this, where we have said from the beginning the new owners of this company are going to be the creditors, we've said that from the beginning -- there is nothing -- which is one reason why I don't understand the fighting that we're doing -- but we've said from the beginning the creditors will be the new owners. Because of that, I would think they would appreciate that premium, because the premium is a fraction of what this case will cost if it's extended. The premium is a fraction of the negative impacts from Chapter 11 on this case.

And then, once again, Your Honor, this is in their control. It's in the control of the creditors. Because if we

don't emerge -- and at the same time they're complaining about a pace premium, they're doing everything -- they were doing everything they could to slow the case down, but I think that has changed -- but I would think that they would like the pace premium. I would think the pace premium, from the creditors' standpoint, would be the new standard. I mean, Mr. Lewis testified that, even though it's unusual, it is beneficial. It benefits the estate. So why should we disregard something that benefits the estate just because it's new and novel? Okay.

Now, the Debtor -- the pace premium was very important to these Debtors. It was very important to these Debtors. Because as you've heard from -- in every hearing, they need to get out quickly. This is not a company which will fare well in Chapter 11. There's a lot of competition and there are a number of competitors that are in trouble, so there is a reason for the pace premium.

You've also heard Mr. Bospflug testify that Houlihan has a unique skillset, understanding, and they have been very happy with their performance and they were impressed by their performance and their skillset.

Now, can we compare in each one of those cases, which I think the chart was distorted because they dropped out $200 million in real debt, but are we comparing each one of those bankers to their skillset? No. But I think we have here, we

have a fee which is reasonable, especially once the clarification is made about what they're seeking and what is no longer in the plan, and we have a debtor who is saying, They have proven that they're, you know, that they're qualified, and we want them and we need them.

I think, under the circumstances, Your Honor, there really is no basis for this objection. This basis is a spillover of a lot of the rancor that I hope is about to leave this case. But we haven't heard anything today from Mr. Lewis or from the cross of Mr. Niemann or from anything else that would indicate that it is unreasonable for this Debtor to hire Houlihan based on these terms.

Thank you.

THE COURT: Would you mind, on the record -- you said it in opening, but I just want to make sure I have this straight -- the discount that you discussed, the 30 percent discount?

MR. CALIFANO: Yes, Your Honor. And this was arrived at between -- and, you know, I wish we could have had a counterparty, but the company saw the objections, saw where the objections were focused, and these two changes came at the same time, rights offering and discounted buyout coming out of the plan. Okay. So that changes a lot of the math.

But then on the financing transaction fees, they've all been reduced by 30 percent. So the two percent fee for

secured financing is dropped to 1.4 percent. The three percent fee on unsecured financing is dropped to 2.1 percent. And then the equity raise is dropped from six percent to 4.2 percent.

And I will tell Your Honor that two and three were the same numbers that Mr. Lewis testified in favor of back in 2009, but they have -- Houlihan has agreed with the company to reduce those fees, and the company has agreed and offered up to the creditors that we'll drop those two most objectionable portions of our plan. And we will be filing this week an amended plan, an amended disclosure statement, that drops those two provisions that gathered so much ire.

So, Your Honor, once again, I think under these circumstances it's clearly reasonable to hire Houlihan on the terms in their engagement letter as modified by the agreement today. Thank you.

THE COURT: You get to go last. And in your last pass, if you would address what we know is the United States Trustee's issue, all right?

MR. LEBLANC: Yes, Your Honor.

CLOSING ARGUMENT ON BEHALF OF THE UNSECURED CREDITORS' COMMITTEE

MR. LEBLANC: Good afternoon, Your Honor. Andrew Leblanc of Milbank on behalf of the Official Committee.

Your Honor, let me just try to address very quickly the issues we have, and they're twofold. I mean, the first one,

Mr. Califano can say that the fees are reasonable, but they're literally off the charts, and I mean that. Even Mr. Niemann's own chart of monthly fees shows that $200,000 a month is off of the chart. He admitted today under cross-examination that the $200,000 -- the one fee that was $200,000 was an out-of-court case. It didn't have to come in before Your Honor. It didn't have to get approved. So there's literally not a single case in his study that has a fee that is $200,000, but theirs does. Mr. Lewis' evidence is exactly the same. It's literally off the charts.

But Your Honor, it's in some respects the wrong way to think about this, because the way to think about this is what's the total all-in fee. And importantly, when the company was -- apparently, when the company was being presented with this by Mr. Niemann, Mr. Niemann didn't present that information to the board. What the board received was an analysis of just the monthly fees and the restructuring fees, but that analysis shows that the monthly fee is beyond any other case and that the restructuring fee is beyond any other case. That's what the evidence shows. And I'll talk in a minute about the debt issues, but that's what the evidence shows.

And what he also didn't show is all of the other bells and whistles that these investment banker letters have, with good reason, because the crediting of fees, caps on fees, because

we don't know what's going to happen.

Now, they told us today as we walked in here that they'd removed the rights offering or they will remove the rights offering from the plant. It's -- that's fine. They remove the rights offering. But the engagement letter still, and if Your Honor approves it under 328, their fee application will still provide them with a 4.2 percent fee on any rights offering.

So, if as the future owners of the company, the creditors, if the creditors decide that they want to raise capital to take out the two tranches of secured debt that are sitting in front of them, they're going to have to pay Houlihan a fee. And the testimony, Mr. Niemann's testimony was that'd be an $8.4 million fee, on top of the six or the $6.9 million, on top of the monthly fees, and on top of any other financing fees, because there's no crediting whatsoever.

Mr. Lewis' evidence, which wasn't rebutted -- they didn't challenge any of the evidence he offered -- showed that in virtually every case there's some form of crediting, whether it's from existing creditor -- whether it's crediting because it's from an existing creditor or it's just crediting for financing raised against the transaction fee, so that the investment banker can have an expectation of an all-in fee that is reasonable.

Now, we talked about this with Mr. Niemann, the all-in fee

-- and Mr. Lewis talked about it as well -- the all-in fee that they calculate here, using the Debtors' current plan, again, the one even extracting the rights offering, has an all-in fee that exceeds $11 million. And again, if you look at Mr. Lewis' Exhibit D, which is the chart of actually-received transaction -- actually-received total fees for investment bankers, that is off the charts yet again. It's almost two percent of the funded debt of this company that would be paid in fees. It's a quarter of their EBITDA that would be paid in fees, a quarter of their annual earnings that would be paid in investment banker fees.

What Mr. Lewis testified to and what the evidence actually shows is that what is market in these cases is a 1.1 percent fee. That is the average fee.

Now, Your Honor, as Your Honor knows, that pales in comparison. That's a multiple of what Your Honor approved in the *Erickson* case, $125,000 and a $2 million transaction fee with a $3 million cap on total fees. It pales in -- those -- these numbers are just enormous for the type of work that's being done here.

And there's lots of examples. We get -- because if we look at *CHC*, using that case as an example and correcting for the two mistakes that were made in Mr. Niemann's chart, adjusting the debt for the additional $500,000. And again, we think it's wrong to include operating leases as part of that

analysis. It makes no sense whatsoever. It's not the funded debt of the company. It is not funded debt of any company. But if you want to do it and you're doing a comparative study of 39 different firms and the fees that were paid in those 39 different firms, you have to be consistent. So, to be consistent, you either have no operating lease expense as part of the financing and instead you use what's in every disclosure statement, what's in every 10-K, what's in every first-day declaration that says, Here is what the funded debt of the company is, and you use that as your metric, or you go through every one of those cases and you figure out what the operating lease expense is and you add it to their debt. It's far simpler. You just have to compare apples to apples. You can't compare apples to oranges, which is what was done here. And Mr. Niemann admitted it in his analysis. He didn't include operating leases for CHC. He did include them for the subject company.

So, Your Honor, the issue we have is that these fees are off the chart. And it's no answer -- even the 30 percent, if you compare the 30 percent reduction in the financing fees, you still have an above-market and beyond-market monthly fee. You have a beyond-market transaction fee, the $6.9 or the $6 million. And you have an above-market -- even those fees, once reduced, are still above the market. You can see that from Mr. Lewis' work, even after being reduced by 30 percent.

That doesn't even take into account the fact that every other one of these has crediting or a cap as a way to cabin the fees.

Your Honor, if you were to approve this structure today, and even if the plan that's proposed was -- were confirmed, and this company had to pay at the end of the day more than $11 million in investment banking fees for this plan, it would be very unfortunate. I think that wouldn't be consistent with 328.

Now, the other issue we have, Your Honor, I won't dwell on it, but we certainly have concerns about the conduct of the case and whether or not this case is being run for the benefit of an insider. They can say it's not an insider plan, but let's just be honest. Mr. Gonsoulin is the largest shareholder of this company. He's appointed every member of the director, or at least has the -- board of directors, or he has the ability to remove every one of them. He's the one with whom they negotiated this plan. He is the one.

They didn't negotiate it with unsecured creditors. They proposed a plan without negotiating with unsecured creditors. And Your Honor, they've done that. Okay. We're dealing with it. We're going to mediation. That's all fine and well. But we think there are real things that have to be investigated there. That's the reason that we went back to that August 22nd presentation, to determine whether or not these were --

the structure of these prepetition negotiations were Houlihan's design. And we think that's a question that needs to be looked at, which is why -- and let me get to sort of the finishing here, Your Honor. There is no evidence in this record upon which you could approve this fee. There's no evidence of actual negotiations, of changes in terms, of anything like that, other than what you just had happen this morning when we walked into court, that they've reduced the fee.

What we would submit, Your Honor, would be appropriate here, particularly because we are now going to mediation with respect to the plan, is we think Your Honor should take this *sub judice*. Allow us to have the mediation. We will deal with this in the context of that mediation. You could decide it at any time, obviously, Your Honor, but we think it would be inappropriate for the Court to decide it now. Because if there's a new plan that arises from that, then we'll either know what Houlihan's fee would be under that new plan, or alternatively, as Mr. Niemann said, he wants to get the fee approved by this Court, but then he concedes that he's happy to negotiate it if the creditors want to put in money and will condition it on him taking less of a fee than this Court approves. Let's just get to that step right now. Your Honor could take this *sub judice*, not approve it, because we don't question Houlihan's qualifications. We don't take lightly the

idea of standing before the Court and objecting to their retention or the components of their retention that are problematic to us. And let us try to deal with that as part of this process as we go forward. And if we can't, then Your Honor can approve -- Your Honor can decide the motion. And I would submit, Your Honor, you would have to say it can't be approved on this record. They've got to come back and present evidence from somebody to show that it was actually negotiated. And I don't think you could ever approve it on this record because it literally is a fee that is off the charts when you look at it on a total basis. And we know that already based on their proposed plan.

Let's see what it is after negotiation, after we're sitting in a room with a mediator. It's not going to be the focus of this mediation, Your Honor, but we think it could absolutely benefit from that time where people can actually spend time together and see if we can get to a resolution on this issue as well.

What we would urge, though, Your Honor, is to not enter an order on this. And not -- we don't think you can approve it, but certainly we don't think you should approve it today, because it locks in -- it's just another point of leverage. He -- Mr. Niemann said he'll negotiate his fee if people want to put money in to take out that secured debt. Let's let that happen now, before Your Honor approves it.

I'm happy to answer any questions, Your Honor, but I think the evidentiary record on this was pretty clear. I don't think there's any real dispute about -- there's no evidence that this is a reasonable fee under any standard.

Unless the Court has any questions, I would -- we would urge the Court to defer ruling on this motion. Or, alternatively, if Your Honor is not inclined to do that, to deny the motion and -- without prejudice and allow them to resubmit with additional evidence and sharpening their pencils on the fees.

THE COURT: Thank you, Mr. Leblanc.

MR. LEBLANC: Thank you, Your Honor.

THE COURT: I actually don't have any questions of you. Thank you.

Hold on, Mr. Califano. You're still wanting to cut off the U.S. Trustee, but they need to --

MR. CALIFANO: I'm sorry, Your Honor.

THE COURT: They get heard.

MS. KIPPES: Next time I'm going to wear a really loud jacket so people can see me.

CLOSING ARGUMENT ON BEHALF OF THE UNITED STATES TRUSTEE

MS. KIPPES: Your Honor, Meredith Kippes on behalf of the United States Trustee.

I'm going to piggyback off of Mr. Leblanc a little bit. He called these fees off the charts. Noted that the all-in

fee with the 30 percent reduction is now $11 million if everything happens and they get everything. He noted it's two percent of the funded debt. It's a quarter of EBITDA.

These are precisely why -- these sorts of concerns about what might happen at the end is precisely why the U.S. Trustee has asked for 330 review. Because as Judge -- you're Judge Hale -- Judge Lynn said in the *Mirant* case, "The best measure of a professional's contribution to a plan process is the value of their contribution to the case." And at the end of the case, we can look at, for lack of a better word, the *gestalt* of the case. We can look at the whole thing and see what happened and see if the fees are reasonable. There's no reason to decide whether they're reasonable now. You can do that at the end under 330.

Thank you.

THE COURT: Thank you. Mr. Califano, you get to go last.

MR. CALIFANO: Yes. Sorry about that, Your Honor.

REBUTTAL CLOSING ARGUMENT ON BEHALF OF THE DEBTORS

MR. CALIFANO: First of all, let me address Mr. Leblanc. You know, and I'm going to go -- I'm just going to ask Your Honor to look at two of the exhibits from their expert. Because I don't know how they're getting to this. Okay.

THE COURT: That was the 33; is that right?

MR. CALIFANO: Yes, 33. Your Honor, first of all, he says there's no deals where there isn't a cap, and I'm just going off his Exhibit B, listing a number of deals, and I assume the checkmark means that there is a cap. There are a number of these comparables that don't have the cap. So, I just don't know where that came from.

But more basically, Your Honor, what happens on every issue here, right, is they change it into this narrative of the insider transaction and the insider plan. Well, this is a public company, okay, and Mr. -- counsel for the Committee loves to get up here and testify. All right. They never have a witness. Today was the first time they brought one, but every other time it's an empty chair and counsel is giving his opinion of what's going on here. And he says, well, the board is -- well, yes, Mr. Gonsoulin has 70 percent of the voting rights. We said that from the beginning. It's no fact which they uncovered. All right, Your Honor?

And I hope Your Honor got a chance, even though the 1103 motion is being put off, we answered their 12 questions. But every time they don't like something, they slip into this is an insider transaction, everything is wrong, we need to investigate. They can't point to any specifics. And now that the rights offering issues are out, this is a really straightforward debt-for-equity plan. But they fall into that at every turn.

And they -- then they talked about a point of leverage. How can they -- how can they say that it gives us more leverage than when we're going -- than it would give them if we went into a mediation with our financial advisor's fee and retention hanging in the balance? First of all, that creates an inherent conflict. Okay. Because we have an advisor, then, who knows, well, if I cut a deal here, if I advise my client to cut a deal, you know, my fees will be wrapped up in it. So, that creates inherent conflict. So, I just think that's inappropriate.

But then think about the leverage it creates by putting somebody's fees at risk while they're having a mediation and while they're throwing around these allegations.

And they said they didn't come in here lightly to object and they -- they came in here, obviously, with one of their hedge fund clients making a call and finding somebody who would come up with an opinion that mattered. That matched.

We have shown -- this is not an apples-to-apples comparison. This was a manipulative comparison that we had. They compared the potential fees that Houlihan could get to actual fees given in other cases.

So, if you look at Exhibit A and this $11 million number, if you look at the postpetition fees, how do they get to $11 million? You have monthlies of, assuming a six-month case, of $946,000 -- this is their calculation -- and a recap fee of

$6,900,000. You have a potential exit ABL fee of $3 million. That's potential. There is no ABL lender in prospect right now. That is a potential fee.

So, if the Debtor -- but now that fee has been reduced, in fact, by 30 percent. So, that would be a possible $2 million if an ABL is obtained.

But the specific fees, the fees that are likely to occur, now that the rights offerings are gone, are the transaction fee and the monthlies. It's not $11 million, Your Honor. And that ABL fee is calculated on a possible -- on the maximum number of a possible ABL. That's a completely different fee. It is not $11 million, as they say. There is a potential upside, now reduced to $2 million, if the full amount of that ABL is raised. That's what it is.

So, the real fees you should be looking at are just the monthly and the restricting fee. And it's a far different story, Your Honor. And I don't casually throw around numbers like $11 million.

And with respect to the U.S. Trustees' objection, Your Honor, in this court, investment bankers are hired under 328. Across the country, investment bankers are hired under 328. Mr. Martin -- I'm sorry, Mr. Lewis testified at his deposition that 328 is the appropriate standard for investment bankers to be hired. It has become standard. We cited in our papers a number of cases from this district. That is typical for

investment bankers because they're not hourly-rate-based. You can't -- it's success-fee-based. And it would be unfair to retain them on a success fee basis and then look back at it and recalculate it. I mean, that's what the cases say, and it's -- I know in every case the U.S. Trustee is bound to object to it, Your Honor, but this has become the standard.

So, with respect -- another thing that Mr. -- that Creditors' Committee counsel testified to was that there was no negotiation. Mr. Bospflug testified that he negotiated this engagement letter. Okay. He negotiated it prepetition, he negotiated it before this plan was in prospect and after months of getting information from Mr. Niemann and assessing his credit -- assessing his abilities.

Your Honor, there isn't any basis to deny their retention. I think Your Honor has all the power, unlike my adversary. I think you have the power both to grant it or deny it. I think you should grant it, Your Honor. I think we need Houlihan.

I also think their suggestion that it be tied up in the mediation is completely inappropriate, because it would then create an inherent conflict between the Debtor and one of the professionals it relies on.

So, I think the record is clear, Your Honor. I think we have spent more than enough time on it. And I think we need to put this to bed. This leverage issue that they have, let's put it to bed, let's go on with the mediation, and I am

convinced that we are going to have a deal in short order. But I think we have to stop letting allegations that have no basis, that they've never put a witness on for, they've never given a shred of evidence, and we have a mountain of evidence to the contrary, they've never put it before your Court, this Court, and they have avoided having these issues tested, but rather, they keep trying to use them as a way to get another path. Let's get past this, let's go on to mediation, and hopefully next time we are before Your Honor we're going to have the framework of a deal.

Thank you, Your Honor.

THE COURT: Thank you, Mr. Califano. We'll come back to a ruling in Houlihan after we've heard the other matters.

MR. CALIFANO: Thank you, Your Honor.

THE COURT: I don't know which one we should move into next. Maybe the KEIP.

MR. CALIFANO: I think the KEIP, because the KEIP, we have a proffer that the U.S. Trustee has asked for, and Mr. Simon is going to read it into the record.

THE COURT: All right.

MR. SIMON: Your Honor, thank you again. Good afternoon. Dan Simon, DLA Piper, on behalf of the Debtors.

I am pleased to announce that we have, over the course of the last 24 hours and into this hearing, worked constructively with the Committee to reach a deal. We have papered the deal.

Our client has signed off, I believe, and I'll ask Creditors' Committee counsel to also confirm at the end that not only do they agree with the deal that I read into the record, but also that their Committee has approved that deal.

And so, with your patience, I will read it into the record, and then I will provide a relatively brief proffer of Mr. Del Genio.

THE COURT: All right.

MR. SIMON: The Key Employee Incentive Plan that is attached to the motion would be approved subject to the following revisions: The net operating cash flow metric would switch to an EBITDA metric based on the Debtors' 2019 business plan, provided that $35 million of EBITDA would be the threshold metric, and that metric would be adjusted based on the timing of the exit. The $35 million number would be adjusted, that is.

Restructuring-related professional fees would not be included in the EBITDA operating metric, and all EBITDA targets are net of all amounts payable under the KEIP plan.

Payments under the KEIP are to be paid in all cash; provided, however, that solely at each KEIP participant's option and discretion, with such notice to be provided no later than two weeks prior to the proposed effective date, a portion of the KEIP payment may be converted from cash to new equity in the Reorganized Debtor at plan value consistent with

past practices.

Upon the consummation of a restructuring transaction, the maximum aggregate -- *i.e.*, for all Debtor KEIP participants -- -- payout in cash, if earned, will be equal to the sum of (1) the threshold bonus, or $3,182,567; (2) Fifty percent equal to the incremental difference between the threshold bonus and the target bonus, which is equal to $530,428; and (3) a twenty percent safety bonus on a prorated basis based on timing from January 1, 2019 through the date of emergence.

On December 31, 2019, the company's overall performance will be measured based on the KEIP metrics as outlined in the KEIP and as modified by what I'm describing now, with the company to pay, at the time the annual incentive plan payments are made, consistent with past practices, the incremental difference in cash, up to the maximum amount contemplated by the KEIP.

Subject to the next provision, all cash payments made upon the consummation of a restructuring transaction shall be accrued, earned, payable, and not subject to clawback.

That next provision is as follows: If any KEIP participant leaves before the later of (1) when the company pays amounts due at the time the annual incentive plan payments are made, consistent with past practices; or (2) April 1, 2020, there is a full clawback of (a) fifty percent of the incremental difference between the threshold bonus and

the target bonus, in an amount not greater than $530,428, to the extent actually paid; and (b) the prorated safety bonus, to the extent actually paid; provided, however, that if the KEIP participant is terminated without cause, there is no clawback, and if the KEIP participant is constructively terminated, and that term will be agreed upon by the parties, there is no clawback.

As provided in the KEIP plan, the KEIP participants may be entitled to receive payment under the KEIP for multiple sale transactions; provided, however, that in the event that a sale transaction occurs in conjunction with a restructuring transaction, the KEIP participant shall only be entitled to receive one payment equal to the greater of the KEIP payment attributable to such sale transaction or the restructuring transaction fee for the entire transaction. And a sale transaction that occurs post-emergence shall not give rise to any payments under the KEIP plan unless such sale transaction would result in payments greater than amounts payable under the KEIP plan as calculated through the date of the sale transaction.

In such circumstance, KEIP participants shall be entitled to the greater of the KEIP payment attributable to such sale transaction or the previously-paid restructuring transaction fee.

Two more bullets, Your Honor.

As provided in the KEIP plan, in the event of the sale of any division but such sale is less than $500 million, the EBITDA metric shall be adjusted on a pro forma basis for measurement purposes effective at the time of the divestiture, and all KEIP participants, including those that are terminated as a result of the sale, shall be eligible to receive a restructuring transaction fee based upon the adjusted budget and other metrics relating to a restructuring transaction.

And lastly, the bankruptcy court maintains jurisdiction in the event there is a dispute on the terms outlined above, either before, at, or after any payment -- after the time of any payment under the KEIP.

So, Your Honor, that's the record. That's the deal. As I was reading through the bullets, I realized I might as well address it in plain English. The deal is as follows, and this is all subject to what I just said. But, basically, previously, the KEIP payment would be paid in full in cash upon either the consummation of a restructuring transaction or a sale transaction. Now, it's paid in part. It's paid up to the threshold, plus an incremental piece. And this gives management the ability to earn the difference basically on the backend. It gives the Creditors' Committee some comfort that each of these KEIP participants won't be leaving immediately after consummation of that, the transaction. That was the basis of the deal.

And with that, Your Honor, I would ask the Creditors' Committee to confirm that that has been agreed upon.

MR. LEBLANC: Yes, Your Honor.

THE COURT: Thank you.

MR. SIMON: Before I go into the proffer of Mr. Del Genio which was asked for by the U.S. Trustee, I would just note for the record: This was not an easy deal to get to, Your Honor, and I just want to thank Mr. Zellin from the Committee, Mr. Pulio (phonetic), Mr. Del Genio, Mr. Bospflug, and Mr. Grath (phonetic) for helping move this along very quickly.

Just moving along, Your Honor, we'll just proffer the testimony of Mr. Del Genio. As you know, Mr. Del Genio is present in the courtroom, and if called upon to testify, would testify as to the following.

PROFFER OF TESTIMONY OF ROBERT DEL GENIO

MR. SIMON: Mr. Del Genio is a managing director at FTI Consulting. He currently serves as the chief restructuring officer of the Debtors, and has served in that capacity since March 12, 2019.

Prior to the petition date, Mr. Del Genio, along with other members of FTI, certain attorneys from DLA Piper, and Mr. Jamie Hinch, the Debtors' chief administrative officer, compromised a working group to review, evaluate, modify, and ultimately recommend a Key Employee Incentive Plan for PHI.

The purpose of the working group and ultimately the purpose of the implementation of the KEIP was to properly incentivize senior management of the Debtors through the Chapter 11 bankruptcy case. Although certain elements of the KEIP have retentive effects, the KEIP is not primarily retentive, and is, in fact, an incentive plan.

Through that process, which began in January and culminated in the compensation committee's approval of the Key Employee Incentive Plan on February 20, 2019, the KEIP, as approved by the compensation committee on that date, contained two triggers for payment. Either the consummation of a restructuring transaction or the consummation of a sale transaction.

The sale transaction requires a sale of all or substantially all of the Debtors' businesses in excess of $500 million. The restructuring transaction is payable based upon financial metrics, previously net operating cash flow, now EBITDA, between threshold, target, and stretch, and that's based upon the Debtors' financial performance during the relevant period.

The KEIP also includes a safety component which can modify the KEIP payments upwards or downwards by 20 percent. Mr. Del Genio would further testify that safety is always an important component of any incentive plan at PHI.

Mr. Del Genio would further testify that the metrics

described are difficult to achieve, and it is possible that a sale transaction or a restructuring transaction is triggered but no KEIP bonus would be payable.

Since the filing of the motion, Mr. Del Genio was involved in various settlement negotiations with the Committee regarding resolving the Committee's objection to the KEIP, including just prior to and during today's hearing. The settlement as read into the record earlier accurately represents the settlement as agreed upon during this hearing, and Mr. Del Genio would testify as such.

This would conclude the proffer of Mr. Del Genio.

THE COURT: Thank you, Mr. Simon.

Mr. Del Genio, if you would come up and let me swear you in. I believe you may be asked questions, so why don't you just come up all the way to the front, if you would?

ROBERT DEL GENIO, DEBTORS' WITNESS, SWORN

THE COURT: You may be seated. Did you hear the proffer of your testimony by Mr. Simon?

THE WITNESS: I did, Your Honor.

THE COURT: And was it true and correct?

THE WITNESS: Yes, it was.

THE COURT: And if you had been asked questions and given answers, would you have testified the same?

THE WITNESS: Yes, I would.

THE COURT: Is there anything that you'd like to add

to your proffer?

THE WITNESS: The only thing I'd like to add is Mr. Simon was involved in this and he deserves some credit as well.

THE COURT: I'm sure he appreciates that.

Does anyone have any questions of Mr. Del Genio?

MS. KIPPES: Thank you, Your Honor. Meredith Kippes on behalf of the United States Trustee.

CROSS-EXAMINATION

BY MS. KIPPES:

Q Good afternoon, Mr. Del Genio.

A Good afternoon.

Q I have a few questions. Who negotiated the incentive plan on behalf of the Debtors?

A The incentive plan was presented by the working group, which was made up of Mr. Simon and members of my team, myself. We also worked with the compensation committee. So, we presented this, and Mr. Hinch was involved from the company side initially because he's the chief administrative officer and very familiar with their historic compensation plans.

We then, with the formation of that, a conversation with Mr. Bospflug, who is the president and chief operating officer, about KEIP participants and the structure of this, presented it to the compensation committee. They, like all compensation committees, asked questions, challenged, and we

worked through that to ultimately come up with a plan that we were really prepared to present to this Court.

Q Okay. Did current management have separate counsel during the negotiations?

A They might have, but I don't -- I didn't interact with them, so that, I don't know.

Q Do you know whether this -- somebody independent of the Debtor was negotiating the incentive plan on behalf of the current management?

A What I would say is that the -- as part of the working group, we had put that together. Mr. Bospflug talked to his management team, and they found this acceptable, knowing that it had to be approved by the Court. So, it was a conversation with them. They understood the provisions of that. They went through that, quite frankly, Mr. Simon and I took questions on that and explained that to members that had some questions, but there was also discussion on that side.

The other thing I'd point out is, because the compensation committee, it regularly looks at how their compensation relates to the peer group and does studies on that, that they were pretty familiar with how their compensation worked historically. And then the work we put together with DLA to show what are comparable for KEIPs, they also had the benefit of that, as well as the compensation committee and our judgment on what was market, which I have testified to.

Q Okay. Do you think any of the current management would resign if this isn't approved today?
A Well, I believe that this KEIP is very important to provide the incentives for management. KEIPs are designed so that you have proper incentives during this process, because what -- there's two things that I think are really important. Is (1) you need to preserve and enhance the value of the company and the estate for the benefit of all the stakeholders; and (2) is they need to focus on providing safe and reliable transportation.
KEIPs are designed so management can be focused in the midst of what I would call the Chapter 11 process. And there's a lot of distractions in that process. And what you need to do is you need to design incentives so they know, if they're doing what they need to do, they're going to get properly incentivized, so they're not worried about what their compensation is going to be, they're not going to listen to people who might be talking to them about seeking other offers, which there has been some inbound inquiries. We felt very strongly, and so did the compensation committee, we need to have that in place to, first and foremost, drive those incentives I've talked to, but as Mr. Simon says, there is some retentive aspect to it. And if people are focused on, here's what I need to do, these are what are the incentives in place, and if I do that I will be rewarded, they are less

likely to seek other opportunities, or more importantly, respond to other opportunities.

Q Okay. Thank you for that. My question was: Do you think any of current management might resign right now? Do you have a sense of that?

A Yeah, I -- what I would tell you is I know there have been -- there are certain -- and, again, I'm not going to be specific because --

Q That's fine.

A -- of the confidential nature of this, --

Q Yes.

A -- but there have been -- every member of senior management has been approached.

Q Okay.

A And I believe that this is the -- and I've said this before -- best management team in this industry. They've done a really good job. And these are executives that can work in not only this industry, but other businesses. And I think if they're not taken care of, there's a high likelihood they could seek other employment.

Q Do any of them, the incentive plan recipients, have job offers?

A They have -- they have been approached.

Q They have been approached?

A They have been approached by other parties. And I have

talked to Mr. Bospflug and Mr. Hinch about who has been approached. Again, it's confidential, but they are -- one of the reasons that this KEIP is in place is, again, to provide the right incentives and to make sure that they're focused on doing what they're doing. And it's not just my concern. It was a concern of the compensation committee as well.

Q Okay.

MS. KIPPES: No further questions, Your Honor. Thank you.

THE COURT: Thank you, Ms. Kippes. Does the Committee have any questions of Mr. Del Genio?

MR. LEBLANC: We do not, Your Honor.

THE COURT: Mr. Simon, do you have any follow-up questions?

MR. SIMON: Just very brief, Your Honor.

REDIRECT EXAMINATION

BY MR. SIMON:

Q Mr. Del Genio, Ms. Kippes asked you whether current management retained separate counsel in connection with the KEIP. How many KEIPs have you seen in your experience, either at FTI or CDG or previously?

A It seems like almost every case there's a discussion on KEIP. People at the firm kind of refer to me as the KEIP magnet because I seem to get involved in most of these. So, it's a pretty typical situation for me because it always seems

like this is an important issue and I'm the one, a lot of times, that has to deal with it. So, it's -- I'm used to dealing with this.

Q Do you find it customary for management to retain separate counsel in connection with the KEIP?

A I think it's rare. I merely have seen it on one or two occasions, but they're very rare.

Q Certainly not customary?

A It is not customary.

Q And it doesn't surprise you in this case that that didn't happen, either?

A No, I think management usually relies on the professionals that the company retains and what their view is of the KEIP as it relates to the bankruptcy process, both financial and legal professionals.

Q Okay. Lastly, Ms. Kippes asked you if you thought management would resign if the KEIP were not approved today. That being a tough question, let me ask you: Is there a risk of any one of the KEIP participants leaving if the KEIP were not approved today?

A Yes, I believe there's risk, and that's why the -- one of the reasons. But again, I think the -- what I think is very critical here is a well-designed KEIP with the right type of incentives keeps management focused on what they're doing and less likely to listen or look for other alternative, which is

another way of saying it has -- keeps them focused and less likely to leave.

Q What do you think the business impact would be to the Debtors if one or more of the KEIP participants left?

A It would be very significant. These are experienced executives that are not easy to replace that have worked in this industry, for this company and similar companies, and it would be very difficult to replace. And it would harm the company significantly if these senior members left at this point in time.

Q Lastly, did the working group and the compensation committee take all of those factors into account when formulating and implementing the KEIP?

A Yes, we did.

MR. SIMON: Thank you, Your Honor. Nothing further.

THE COURT: Does anyone else have any questions of Mr. Del Genio?

You may step down, sir. Thank you.

THE WITNESS: Thank you.

(The witness steps down.)

THE COURT: Anything further on the KEIP motion? Ms. Kippes, were you -- are you satisfied with your objections?

MS. KIPPES: Your Honor, I'll take that as an invitation to argue a little bit. Meredith Kippes on behalf of the United States Trustee.

As Mr. Del Genio acknowledged, there are retention aspects to this KEIP. This is why we had asked the Court to consider it under the higher standard of 503(c)(1) rather than the lower standard of 503(c)(3). And we maintain that the Court should look at this, since it involves insiders and it does have a retention aspect, that the Court should evaluate this plan under 501(c)(3) and evaluate whether the Debtor has met the standards under 501(c)(3).

As the Court knows, it's the Debtors' burden. And if a plan does not require affirmative action -- it does here -- beyond that contemplated prepetition, then it's not an incentive plan. There's testimony -- the proffered testimony of Mr. Del Genio suggests that there are metrics in place which would meet the standard. But again, that is for the Court to decide. And we would ask that the Court decide it under Section 503(c)(1) rather than the lower standard of 503(c)(3).

Thank you.

THE COURT: Thank you. Mr. Simon, you get to go last.

MR. SIMON: Your Honor, there was uncontroverted testimony. In fact, Ms. Kippes' questions did not address whether this was an incentive plan or a retention plan. This is clearly an incentive plan. We're seeking it under 503(c)(3) of the Bankruptcy Code and Section 363 of the

Bankruptcy Code. There is a slightly different -- there's some uncertainty in the case law about the proper standard to apply under those sections, either the business judgment rule or some slightly different standard, as highlighted by Judge Lynn in *Pilgrim's Pride*, but in any event we have met those standards.

I think it's very important to note that the Key -- the economic participants in this KEIP have now signed off on this KEIP with the deal with the Creditors' Committee. The sole retentive effect that was addressed in the U.S. Trustee's objection was simply that they have to be here in order to be paid. We noted in our reply that's illogical. That doesn't make sense. Because if it -- if that weren't the case, we would actually be incentivizing these employees to leave. Certainly, that's not the law, and that's not appropriate as argued by the U.S. Trustee.

This is under 503(c)(3). We have shown that's it's justified by the facts and circumstances of this case. Mr. Del Genio just highlighted the fact that there are solicitation impacts relating to these key participants. This was in the mind of the compensation committee on February 20th, and it still is today. And it's important and appropriate and well within the business judgment of the Debtors to implement this Key Employee Incentive Plan, and we believe it is justified by the facts and circumstances.

Thank you.

THE COURT: Thank you. We'll go to mediation and adjournment, take a short recess, I'll come back and give you a ruling in this one.

MR. SIMON: Okay.

MR. CALIFANO: Your Honor, we just need five minutes to work out the language for mediation. We just have to work out one term. Is it all right if we take a five-minute break for the mediation? I know we have time constraints.

THE COURT: Sure. That'd be fine. Remember that Mr. Levick -- where are you, Mr. Levick?

MR. LEVICK: I'm right here, --

THE COURT: Yes. Okay.

MR. LEVICK: -- Your Honor.

THE COURT: Mr. Levick has some issue on mediation that we're going to have to address.

MR. CALIFANO: Right. He wants to come, and we don't want him there.

THE COURT: I suspected as much. We'll be in recess for five minutes, though, okay?

(A recess ensued from 4:11 p.m. to 4:19 p.m.)

THE CLERK: All rise.

THE COURT: Good afternoon. Please be seated. Thank you.

All right. That was actually productive, Mr. Califano.

Mr. Simon, the KEIP motion is going to be granted under Section 503(c)(3) and 363. There may be some hint of some sort of retention, but I think that's often the case with KEIPs. But in any event, if you would prepare an order and circulate it, I'll sign it upon receipt.

MR. SIMON: Thank you, Your Honor. What I'll do is I'll send a revised plan to the Committee counsel and we'll make sure we have their sign-off on that before.

THE COURT: All right. Mediation?

MR. CALIFANO: Yes, Your Honor. We have an agreement on a mediation process, Your Honor. And Mr. Dunne or Mr. Khalil can interrupt me if I get anything wrong.

THE COURT: I'm sure they will.

MR. CALIFANO: Yeah. They didn't need my permission, I guess.

All -- the Debtors' disclosure statement is going to be moved to May 29th. The Committee's standing motion is going to be moved to May 29th. We have agreed to a litigation standstill except for two exceptions. The Committee wants to file a motion to terminate exclusivity that will be on for the 29th. The Debtors will be filing a motion for cash collateral usage with -- but -- and I've told the Committee counsel we will preview that motion with them.

The mediation is to start as soon as possible. Monday, if the mediator is available. We have agreed that, subject to

their availability, we can't agree for them, either Judges Houser, Jernigan, Jones, or Isgur, we would be fine with. And we're fine -- we'll leave it with Your Honor to choose. I don't know who you --

THE COURT: Uh-huh. I don't know that I can get a sitting judge that soon, Mr. Califano.

MR. CALIFANO: But we'll start -- we can start and we'll push -- if we have to push things out further, we'll push things out further. But we're just saying we will be available whenever the mediator is available and as soon as Monday.

THE COURT: And let me ask. Why aren't you all going -- why aren't you all actually just going ahead and using a mediator that you can get on board?

MR. CALIFANO: Well, honestly, Your Honor, and it's -- I think that based -- and I think Mr. Dunne agrees with me -- I think, based on the tenor of the case, having a judge will encourage people to behave in a better fashion. It's -- I mean, I think we're -- we would be -- we would appreciate having a sitting judge in place. We think it would be helpful to the process.

THE COURT: All right. I'm just not sure I can accomplish that for you.

MR. CALIFANO: No, I understand that, Your Honor.

THE COURT: I'll just say that.

MR. CALIFANO: I understand that. I understand. And if you want, we can have -- we can do reach-out to the various chambers.

THE COURT: Well, why don't you let me react to that first with them. I don't --

MR. CALIFANO: Thank you, Your Honor.

THE COURT: And then I'll just get back with you all promptly, because I think this does need to be resolved.

MR. CALIFANO: The participants -- we suggest the participants in the mediation, at this stage, Your Honor, be the Debtor; Thirty Two, LLC; the Official Committee of Unsecured Creditors; and the Indenture Trustee. We think there are significant enough issues among those constituents that need to be resolved, and then at a further date it may or may not make sense to bring in other participants. But right now, there are a number of issues, and I think we've got to take sort of the main event first and then work our way from there.

So, that's -- I know I was kind of flip when I said we didn't want Mr. Levine [sic] there. It's not that. We just really have too much to focus on between the Debtors and the Committee.

THE COURT: So, who would be participating in the mediation?

MR. CALIFANO: It would be the Debtor; Thirty Two,

LLC; the Official Committee of Unsecured Creditors; and the Indenture Trustee. And as I said, Your Honor, a two-week litigation hold except for the motion to terminate exclusivity and the cash collateral motion that'll be filed. And the Debtors' time to respond to the motion to terminate exclusivity will be conterminous with the end of mediation, either successful or when the parties say mediation won't work any further.

Did I get it right?

MR. DUNNE: You got it right.

MR. CALIFANO: Thank you.

MR. DUNNE: Your Honor, just a couple of comments from the Committee. And for the record, it's Dennis Dunne from Milbank.

We support mediation. We think it's time. I think what you saw with us today on the KEIP is an example of what can be accomplished when we get the requisite information, full engagement from the Debtors, and people are trying to draw towards a solution. And I agree that we should put down the litigation cudgels for a few weeks and see where we can get to.

With respect to the sitting judge request for mediator, I just -- frankly, I just found myself, and this is anecdotal, and, you know, the plural of anecdote is not data, so it's just anecdotal -- which is that I've had better success with

sitting judges in the past few years, or recently retired judges, and would love to take a shot at that in this case because we'd love to try to get something done in the next month.

And I think, as Mr. Califano was saying before about some of the rancor, part of what we've been reacting to is what I think has been the out-of-sequence. You had the plan filed and now we're going to go do the negotiations. Let's put that behind us and let's do the negotiations and let's hope we're here at the end of May with good news and that we don't have to worry about all that other litigation that'll pop up on the 29th.

THE COURT: Thank you.

MR. CALIFANO: Thank you, Your Honor.

THE COURT: All right. So, on a mediator, my intentions would be to make an inquiry and try to get back with you all, maybe as soon as tomorrow on that.

MR. CALIFANO: Okay.

THE COURT: So you can react to that.

MR. CALIFANO: As you know, I'll be in town for a couple of days.

THE COURT: We're glad to have you. All right. Let me hear Mr. Levick's comment.

MR. LEVICK: Good afternoon, Your Honor. I'm kind of used to people not wanting me around, so I didn't find that

offensive. As you know, I represent Christina Wray in a putative class of class action plaintiffs who were former customers of the Debtor. In other words, they used the air ambulance service.

This motion was filed on Friday. I conferred with the Debtor. Mr. Califano is correct: They didn't want to invite my putative class or the counsel for the putative class. The Committee didn't really have an opinion on whether we could attend or not, but they thought, if push come to shove, they might not want us there, either.

But let me give you a quick background, Your Honor. As recently as Friday, this past Friday, on ABCnews.com, there's been another big news story about the air ambulance industry and its controversial financial collection practices. As you know, someone may be taken by an air ambulance and they're not conscious and there's no contract, and before they know it they're handed a bill for between $50,000 and $60,000, Your Honor. And Mr. -- the Debtors' rep; I'm sorry, I have his name right here -- Del Genio testified at the 341 meeting last Friday that the reasonable or average cost of that should be about $10,000, $11,000, or $12,000. Well, that's the point of the putative class action claimants.

It's unusual in this case, Your Honor, because the class is not owed money, the class actually owes money to the Debtor, but this class has been described as financially

crippled. After going through all of this physical harm, they're having their financial lives ruined by air ambulance companies. And I'm here to try to help them and maybe put a stop to this or to come up with something reasonable.

So, here we are in this situation, and we're weighing our options, Your Honor. We have a pending case in Arizona. Do we file a motion for relief from stay to continue that? Do we file some kind of cause of action in this Court that may try to stay some of the collection practices until this Court or another court can determine what the reasonable value of such a service is? Because, remember, there's no contract.

To establish a reasonable value of these services can help the Debtor, Your Honor, and the reason is because they're trying to collect also from insurance companies. The issue of what is collectable from the putative class is very important to feasibility in the plan, to collections in the plan, but it's also important, you know, for humanity, to try to do something for these thousands of people that are being harassed and think that their financial lives have come to an end.

So, I think there is a chance to do the right thing and to maybe end this litigation in Arizona and not have to file something in this Court that's going to turn out to be very expensive and time-consuming. Here we are on basically one hearing, one contested hearing today, and look at all the

attorneys that showed up. I am a big believer in mediation. I've had mediation get me out of a lot of jams, and I think that -- I'm glad to see that these parties are going to mediation. We just want a seat at the kids' table. We will only speak if spoken to, Your Honor. We realize that while we may think we're the big fish, we're not exactly the big fish at this mediation, but it is such an unusual issue and it looks like you're going to get an all-star mediator, I think we take advantage of that if there's the chance, and we sit down there, and when they have time for us, we'll pipe up, and maybe we can reach a deal on this issue that is crucially important to thousands of people.

So, I know this motion was filed Friday, and here I am on Monday, but I am asking for a seat at the table.

Thank you, Your Honor.

THE COURT: Thank you, Mr. Levick. One more right behind you, Mr. Califano.

MR. GOLUBCHIK: Good afternoon, Your Honor. David Golubchik; Levene, Neale, Bender, Yoo & Brill; for the other Official Committee of Equity Security Holders.

The Equity Committee was just formed late on Thursday, and I reached out to Debtor -- Committee counsel. I won't use the kids' table, but I'll use the sandbox analogy, kind of can we play in the sandbox with you, and I guess the message is not enough sand in the sandbox.

We have a case that started with about half a billion dollars in equity, presumably creditors in the money, the issue is Equity Committee. We have the U.S. Trustee forming the Equity Committee. So, there's some view that equity has an interest in this case. And the day after the Equity Committee was formed, I guess the Debtor filed a valuation that says the assets are worth or the company is worth about half a billion dollars. So, not only is equity out of the money, but that creditors are partially out of the money.

It's an important issue, and based on the Debtors' motion, the goal here is to minimize litigation and focus on resolution of the case. So far, the Committee has been handling the laboring oar of the litigation. It only seems appropriate that the Equity Committee appointed by the U.S. Trustee should be part of this process, rather than engage in litigation while these guys are working on a mediation. So, we're here telling the Court that we believe the Equity Committee should be part of the process.

THE COURT: Thank you.

MR. CALIFANO: Your Honor, what we do -- what we work out with the Official Committee of Unsecured Creditors isn't going to be binding on any other creditor. Okay. We have serious issues with the Official Committee, as you've seen from the beginning of this case, and we think we can resolve them. But we think it's best if the main players be focused.

Now, the class action, it's an uncertified class of people who say they owe less money to us than we say they owe. Completely inappropriate. They can be dealt with. If they want to make a motion for relief from stay, litigation hold doesn't want to -- doesn't apply to them. If they want to make -- file a class action proof of claim, I'll welcome that.

With respect to the Equity Committee, Your Honor knows our belief about the Equity Committee. There isn't anything here for equity. Okay. I think the clearest indication of that was that Mr. Gonsoulin, who owns a big chunk of equity, walked away from his equity and his only participation is on his secured claim. That has issues, but it's pretty clear -- and Houlihan filed a valuation where the midrange was $480-some-odd million. And we know that the debt here is greater than that.

We need to focus on the main event, and the main event is resolving the issues that we have with this Unsecured Creditors' Committee, which represents the majority of the debt here in this case. It's been tough enough to get here, to get to the point where we're talking about a mediation. We can't have it complicated by other participants who have much smaller stakes, if any stake at all.

Now, we're not going to be able to make a deal that binds the equity or binds this putative class, but we have our own issues to work out, Your Honor, that will only be complicated

by having these other participants. We chose the participants because those are the ones we need to resolve the litigation that is in front of us.

One thing, and I'm sure Mr. Dunne will speak for himself, but one thing we do agree on is that we need our clients and Thirty Two, LLC in the room talking. It's not going to end this case. There's other constituents to deal with who will be dealt with in due course. But we need to resolve these issues with our main constituents, and then -- before we can go forward, or else there's nothing in here for anyone and this case becomes a morass. We'll deal with those people before we confirm a plan. We'll deal with them as part of the process. But right now, we need to focus on the main antagonist.

Thank you, Your Honor.

THE COURT: Thank you.

MR. DUNNE: Your Honor, it's Dennis Dunne on behalf of the Official Committee.

I agree that we should narrow the list of attendees at mediation for now, for a few reasons. Principally, we -- I'd like to focus on maximizing the chance that we have success between and among the Debtors and, you know, the Official Committee and the secured creditors, and recognizing that then we may have to engage others as we move that deal forward.

I've also been involved in too many mediations where

additional parties quickly become ancillary and they end up just sitting in a conference room while the mediator has concluded what we've concluded, that he or she should spend the bulk of his or her time focused on trying to get a deal between the Debtors and the Official Creditors' Committee, and then all we've done is kind of run up the cost to the estate by have other estate representatives sit there.

With respect to the class action question, I don't think that those issues there are right for this mediation that we're talking about, in terms of the capital structure and the balance sheet of Reorganized PHI. And with the Equity Committee, we all recognize that if we get to a deal we'll have to turn around and figure out a way to deal with them or address their concerns otherwise.

Thank you.

THE COURT: Thank you.

MR. GOLUBCHIK: Just briefly, Your Honor. I guess what -- to me, what Mr. Califano says just makes no sense. First of all, Mr. Gonsoulin is giving up equity. Under the insider plan, he gets a lot more of the equity, so I've got that deal. But how the creditors are treated directly affects equity. We have a priority scheme, a waterfall. So, I don't think you can have one without the other.

Of course, the possibility is the Debtor, creditors, get together, work out a plan that makes sense, and basically cut

the bottom off. That's exactly why the Equity Committee should be -- an Official Equity Committee should be part of the process.

THE COURT: Thank you. I said I didn't want to take another recess, but let me take just a real quick one. We'll come back and talk about that.

(A recess ensued from 4:37 p.m. to 4:39 p.m.)

THE CLERK: All rise.

THE COURT: Please be seated. Thank you.

On the mediator, I still think that a private mediator is what you're going to end up with, maybe a former judge, but I'll at least ask the four. I kind of know what is happening in at least two of their lives. And I'll get back to you all tomorrow.

I think the Official Committee of Equity needs to participate in this process. They were just formed. It may very well be that they're out of the money, but I do think that, to fulfill their fiduciary duty to their constituents, they need to attend.

The putative class action, I think, does not participate in this mediation.

And I'll get back with Mr. Califano and Mr. Dunne tomorrow just on the answer on the mediator.

On Houlihan, we actually need to write something up. I can do this by CourtCall tomorrow at 9:00. I think some of

you are actually going to be here for hearings. So you can just register by CourtCall. I'm going to give you a ruling at 9:00 o'clock tomorrow morning. All right.

MR. CALIFANO: Thank you, Your Honor.

THE COURT: Thank you very much.

(Proceedings concluded at 4:40 p.m.)

--oOo--

CERTIFICATE

I certify that the foregoing is a correct transcript from the digital sound recording of the proceedings in the above-entitled matter.

/s/ Kathy Rehling **04/30/2019**

_______________________________________ ____________________

Kathy Rehling, CETD-444 Date
Certified Electronic Court Transcriber

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Exhibit "B"

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

In re:	Chapter 11
PHI, Inc., *et al.*,[1]	Case No. 19-30923-hdh-11
Debtors.	(Jointly Administered)

ORDER (I) AUTHORIZING THE DEBTORS
TO IMPLEMENT KEY EMPLOYEE INCENTIVE PLAN AND
(II) GRANTING RELATED RELIEF

This matter coming before the Court on the Motion[2] filed by the above-captioned debtors (collectively, the "Debtors") seeking approval and implementation of the Debtors' KEIP and

[1] The Debtors in these chapter 11 cases, along with the last four digits of each Debtor's federal tax identification number, are: PHI, Inc. (5707), PHI Air Medical, LLC (4705), AM Equity Holdings, L.L.C. (0730), PHI Tech Services, Inc. (5089) and PHI Helipass, L.L.C. (4187). The corporate headquarters and the mailing address for the Debtors listed above is 2001 SE Evangeline Thruway, Lafayette, LA 70508.

[2] Capitalized terms not otherwise defined herein shall have the meanings ascribed to them in the Motion.

granting related relief; the Court having reviewed the Motion; all as more fully set forth in the Motion; and upon consideration of the First Day Declaration, the Del Genio Declaration, the testimony in support of the Motion, and the announcement and the reading into the record of an agreement between the Debtors and the Official Committee of Unsecured Creditors during the April 29, 2019 hearings; and this Court having jurisdiction to consider the Motion and the relief requested therein pursuant to 28 U.S.C. §§ 157 and 1334; and this Court having found that this is a core proceeding pursuant to 28 U.S.C. § 157(b)(2); and this Court having found that venue of this proceeding and the Motion in this District is proper pursuant to 28 U.S.C. §§ 1408 and 1409; and this Court having found that the Debtors' notice of the Motion and opportunity for a hearing were adequate and appropriate under the circumstances and no other notice need be provided; and this Court having reviewed the Motion; and this Court having determined that the legal and factual bases set forth in the Motion establish just cause for the relief granted herein; and this Court having found and determined that the relief sought in the Motion is in the best interests of the Debtors' estates, their creditors, and other parties in interest; and upon all of the proceedings had before this Court; and after due deliberation and sufficient cause appearing therefor,

IT IS HEREBY ORDERED THAT:

1. The Motion is GRANTED as set forth below.

2. The KEIP, as described in **Exhibit A** to the Motion, is hereby approved subject to the following modifications, which were announced in open Court and read into the record as the agreement between the Debtors and the Official Committee of Unsecured Creditors:

- The Net Operating Cash Flow metric will switch to an EBITDA metric based on the Debtors' 2019 Business Plan, provided that $35 million of EBITDA will be the "Threshold" metric, which Threshold will be adjusted based on the timing of the Restructuring Transaction.

- Restructuring-related professional fees will not be included in the EBITDA metric, and all EBITDA targets will be net of all amounts payable under the

KEIP.

- Payments under the KEIP are to be paid in all cash; provided, however, that solely at each KEIP Participant's option and discretion, with such notice to be provided no later than two weeks prior to the proposed effective date, a portion of the KEIP payment may be converted from cash to new equity in the reorganized Debtor at plan value consistent with past practices.

- Upon the consummation of a Restructuring Transaction, the maximum aggregate -- i.e., for all Debtor KEIP Participants -- payout in cash, if earned, will be equal to the sum of (1) the Threshold bonus, or $3,182,567; (2) fifty percent equal to the incremental difference between the Threshold bonus and the Target bonus, which is equal to $530,428; and (3) a twenty percent safety bonus on a prorated basis based on timing from January 1, 2019 through the date of a Restructuring Transaction.

- On December 31, 2019, the Company's overall performance will be measured based on the KEIP metrics, as modified by this Order, with the Company to pay, at the time the Annual Incentive Plan payments are made, consistent with past practices, the incremental difference in cash, up to the maximum amount contemplated by the KEIP.

- All cash payments made upon the consummation of a Restructuring Transaction shall be accrued, earned, payable, and not subject to clawback, subject to the following: if any KEIP Participant leaves before the later of (1) when the Company pays amounts due at the time the Annual Incentive Plan payments are made, consistent with past practices; or (2) April 1, 2020, there is a full clawback of (a) fifty percent of the incremental difference between the Threshold bonus and the Target bonus, in an amount not greater than $530,428, to the extent actually paid; and (b) the prorated Safety Bonus, to the extent actually paid; provided, however, that if the KEIP Participant is terminated without cause, there is no clawback, and if the KEIP Participant is constructively terminated, and that term will be agreed upon by the Company and the Official Committee of Unsecured Creditors, there is no clawback.

- As provided in the KEIP, the KEIP Participants may be entitled to receive payment under the KEIP for multiple Sale Transactions; provided, however, that in the event that a Sale Transaction occurs in conjunction with a Restructuring Transaction, the KEIP Participant shall only be entitled to receive one payment equal to the greater of the KEIP payment attributable to such Sale Transaction or the Restructuring Transaction Fee for the entire transaction. And a Sale Transaction that occurs post-emergence shall not give rise to any payments under the KEIP unless such Sale Transaction would result in payments greater than amounts payable under the KEIP as calculated through the date of the Sale Transaction. In such circumstance, KEIP Participants shall be entitled to the greater of the KEIP payment attributable to such Sale Transaction or the previously-paid Restructuring Transaction Fee.

- As provided in the KEIP, in the event of the sale of any division but such sale is less than $500 million, the EBITDA metric shall be adjusted on a pro forma basis for measurement purposes effective at the time of the divestiture, and all KEIP Participants, including those that are terminated as a result of the sale, shall be eligible to receive a Restructuring Transaction Fee based upon the adjusted budget and other metrics relating to a Restructuring Transaction.

- This Court will maintain jurisdiction in the event there is a dispute on the terms outlined above, either before, at, or after any payment -- after the time of any payment under the KEIP.

3. To the extent there is any inconsistency between the KEIP and this Order, this Order shall govern.

4. The Debtors are further authorized to take any and all actions as may be necessary, desirable or appropriate to effect, implement, and/or consummate the KEIP as modified by this Order, including without limitation, making the payments that may become due thereunder, without further application or order of this Court.

5. All amounts earned and payable under the KEIP as modified by this Order shall have administrative expense priority under sections 503(b) and 507(a)(2) of the Bankruptcy Code for all purposes in these chapter 11 cases and in any other cases under the Bankruptcy Code to which these cases may convert.

6. This Court shall retain jurisdiction over all matters set forth in the Motion, including the entitlement of any party to any payment pursuant to the KEIP as modified by this Order.

 # # # End of Order # # #